89-685

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HUBBARD CHEVROLET COMPANY,
Petitioner

v.

GENERAL MOTORS CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES R. DAVIS
THOMAS, PRICE, ALSTON, JONES
& DAVIS
121 North State Street
Post Office Drawer 1532
Jackson, Mississippi 39215-1532
Telephone: (601) 948-6882
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Whether Rule 51 of the Federal Rules of Civil Procedure prohibits an appeal from a jury verdict rendered on the implied covenant of good faith and fair dealing where there was no objection to the instruction to the jury that the covenant applied.

Whether the holding by the Court of Appeals that Petitioner's rights under the Mississippi Motor Vehicle Commission Law are limited to those available under the Federal Dealers' Day-in-Court Act, 15 U.S.C. § 1221, *et seq.*, is an improper preemption of the state statute, where the state statute places additional responsibilities on Respondent.

Whether the implied covenant of good faith and fair dealing must be expressly stated in the contract to be applicable to discretionary actions of Respondent.

PARTIES TO THE PROCEEDING BELOW

Hubbard Chevrolet Company * ("Hubbard") is Petitioner and was Appellee/Cross Appellant in General Motors Corporation v. Hubbard Chevrolet Company, No. 88-4302.

General Motors Corporation ("GM") is Respondent and was Appellant/Cross-Appellee in the Fifth Circuit Courts of Appeals.

---

* Hubbard Chevrolet Company is a Mississippi corporation which has no parent, subsidiary, or affiliated corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ———

HUBBARD CHEVROLET COMPANY,
Petitioner

v.

GENERAL MOTORS CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 873 F.2d 873, and is reprinted in the Appendix hereto as Appendix A. The opinion of the United States District Court for the Southern District of Mississippi is reported at 682 F. Supp. 873, and is reprinted in the Appendix hereto as Appendix B.

JURISDICTION

Following the Fifth Circuit Court of Appeals' June 28, 1989, denial of the Petition for Rehearing and Petition for Rehearing *en banc*, a timely application for an extension of time to file this Petition by October 26, 1989, was granted by this Court on September 19, 1989.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROCEDURAL RULE INVOLVED

Fed. R. Civ. P. 51—Instructions to Jury: Objection

> . . . No party may asign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

STATEMENT OF THE CASE

From its founding in 1927 until its demise in September, 1987, Petitioner, Hubbard Chevrolet Company ("Hubbard"), operated in Utica, a small town in Hinds County, southwest of Jackson, the state capitol and Mississippi's largest city. Over its history, Hubbard entered into a series of Dealer's Sales and Services Agreements ("dealer agreements") with Respondent, General Motors Corporation ("GM"). The 1980, 1984, and 1985 dealer agreements between Hubbard and GM state that any dealer who wants to relocate "agrees to give General Motors prior written notice so General Motors can discuss the effect of the proposed change with the Dealer. No change in Dealership Location . . . will be made without the written approval of General Motors." The dealer agreements did not specify the particular location for Hubbard's dealership operations; that was instead stated on a "Dealership Location and Premises Addendum" which notes the address, ownership, premise use, premise size and description, lease arrangements, planning potential and other information concerning the dealership. Whenever any of these dealership characteristics change, GM sends the dealer a corrected premises addendum rather than executing a new dealer agreement.

During the late 1970's and 1980's, Hubbard experienced the effect of negative changes in population, economic conditions, and traffic patterns in Utica, a declining rural town whose population of less than 1,000 has decreased since 1970. In contrast, Raymond, which

until 1984 was in Hubbard's "area of primary responsibility" ("APR") (which is the market area in which GM measures dealer sales and service performance), is a thriving community which by 1985 was nearly three times larger than Utica. Although Hubbard did well overall in its APR, market penetration in Raymond was poor for Chevrolet and even worse for Hubbard. This problem was compounded in the 1980's by construction of a four-lane highway from Jackson to Raymond, leaving Hubbard separated from Raymond by fifteen miles of winding two-lane road, while access from Raymond to Jackson was easies than ever. Meanwhile, GM was also permitting Hubbard's three Jackson-area competitors, as well as numerous other dealers in the New Orleans zone, to move to more favorable sites.

Because of these changes, Hubbard's management recognized that its only opportunity for long-term viability was to relocate its dealership to the four-lane highway near Raymond. After two Chevrolet officials encouraged the move, Hubbard's management met with Jack Croft, the new Chevrolet zone manager for New Orleans, and his assistant, Greg Mitchamore, in 1980. Hubbard then sent a written relocation request explaining the necessity of moving. Croft refused to respond in writing either to this request or to Hubbard's continued relocation requests until two years later. The denial letter gave no reasons for denying the request. Orally, Croft gave three reasons for refusing to permit Hubbard to relocate: (1) GM wanted to keep its Chevrolet dealership in Utica; (2) Raymond was too close to Clinton, where GM might place a dealer; and (3) Raymond was too close to Jackson. At trial, testimony by GM representatives contradicted the truthfulness of all three of these reasons. After 1980, Hubbard continued to write letters to Croft and other zone personnel requesting permission to relocate but these requests were similarly rebuffed.

In May, 1984, citing the same reasons Hubbard had given for his desire to move to Raymond, GM took the Raymond area away from Hubbard and reassigned it to Hubbard's competitors, the Jackson dealers. The removal of Raymond from Hubbard's APR prevented Hubbard from ever relocating there. Hubbard protested the removal of Raymond and continued to press GM for permission to move, but to no avail.

Raalizing that its problem was in Detroit rather than in the zone, Hubbard wrote the "number two" man at Chevrolet, General Saes Manager Robert Starr, detailing the necessity of relocation. In response, Hubbard received a letter from another GM employee, John Kutina, again denying the relocation request. This letter also informed Hubbard that, because Utica was no longer a viable dealership point, if Hubbart tried to sell the dealership to any other person, that person would not be approved as a Chevrolet dealer. Hubbard suffered an overall loss for the years 1985 through 1987, and, without the possibility of moving to Raymond, was reluctantly forced to close in September, 1987, having been unable to sell the dealership.

In December, 1985, Hubbard brought this action against GM in the United States District Court for the Southern District of Mississippi. The complaint alleged causes of action against GM based upon breach of the implied covenant of good faith and fair deaing, breach of fiduciary duty, and violations of the Federal Dealers' Day-in-Court Act, 15 U.S.C. §§ 1221, *et seq.* (hereafter "Federal DDCA"), and the Mississippi Motor Vehicle Commission Law, Miss. Code Ann. § 63-17-73 (1972) (hereafter "Mississippi MVCL"). The district court, Honorable Tom S. Lee presiding, partially granted GM's motion for summary judgment and dismissed the federal and state statutory claims. *Hubbard Chevrolet Co. v. General Motors Corp.*, 682 F. Supp. 873 (S.D. Miss. 1987).

Hubbard's claim at trial was that GM acted arbitrarily, dishonestly, and in violation of the implied covenant of good faith and fair dealing in taking the actions which have been summarized above. GM contended at trial that it did not violate the good faith covenant because it made its decisions regarding Hubbard honestly and for legitimate business purposes.

None of the motions or objections made by GM in the district court prior to the jury's verdict questioned the application of the good faith covenant to this case in any cogent fashion. The case was submitted to the jury only on the issue of breach of the good faith covenant. GM did not object to the court's instructions concerning the good faith covenant, and the jury returned a general verdict for Hubbard for two million dollars actual damages.

After the denial of GM's post-trial motions, GM filed an appeal of the jury verdict. Hubbard cross-appealed the district court's granting of summary judgment on the state statutory claim. The Fifth Circuit Court of Appeals affirmed the district court's granting of summary judgment with respect to the state statute. It reversed the jury verdict, however, holding that, as a matter of law, the application of the implied covenant of good faith and fair dealing to the relocation dispute by the district court was error.

REASONS FOR GRANTING THE WRIT

All three questions raised by Petitioner independently merit review by this Court because of the overriding necessity of their resolution in light of decisions by federal circuit courts of appeals which directly conflict with one another and because the instant case is well-suited to enable this Court to answer these three questions.

I. RESPONDENT FAILED TO PRESERVE ITS RIGHT TO APPEAL THE ISSUE OF THE APPLICABILITY OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

The effective, properly regulated functioning of the federal judiciary depends upon this Court's ability to furnish definitive guidelines enabling parties and trial courts alike to interpret accurately the Federal Rules of Civil Procedure. This Court has not hesitated to grant certiorari when necessary in order to provide a clear construction of the Federal Rules of Civil Procedure. *See, e.g., Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964).

The instant case squarely raises to this Court the vitally important procedural issue of the sufficiency of a party's efforts to preserve legal issues for appeal of a jury verdict in the face of that party's failure to object to jury instructions which address that issue. Fed. R. Civ. P. 51 unequivocally requires a party to object to an instruction before the jury retires to avoid a waiver of the objection:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Both Respondent and the Fifth Circuit Court of Appeals have attempted to evade the intended effect of Fed. R. Civ. P. 51 through the improper asumption of appellate jurisdiction to decide a legal issue—the applicability of the implied covenant of good faith and fair dealing to the instant dispute—which was not effectively raised or argued in the trial court by Respondent before the jury verdict. This Court's condonation of the Fifth Circuit Court of Appeals' improper assumption of appellate jurisdiction over this issue would negate the role of Fed. R. Civ. P. 51 within the federal judicial system and would

permit unwarranted assumption by federal appellate courts of jurisdiction over any legal issue to which an appellant had made any reference, however off-handedly, at the trial court level.

The Fifth Circuit Court of Appeals' improper interpretation of the purpose underlying Fed. R. Civ. P. 51 unfairly penalizes Hubbard by precluding it from responding at the trial court level to issues raised on appeal by GM, simply because such issues were not contested at trial. It also unjustifiably removes any responsibility from a party losing at trial, who wishes to appeal a legal issue, to raise sufficient objections to place the trial court on notice of a claimed error in the application of a legal principle which bears correction. The procedural posture of the instant case presents an ideal set of circumstances for this Court to establish clear parameters for the application of Fed. R. Civ. P. 51 by appellate courts.

In its instructions to the jury, the trial court essentially *presumed* that the implied covenant of good faith and fair dealing potentially applied to the dispute between Petitioner and Respondent, and that a breach of the implied covenant of good faith and fair dealing would occur if GM failed to exercise discretion accorded under the pertinent dealer agreements honestly and in good faith. (R. 10, p. 7-9, Appendix C). When Respondent's counsel was asked by the trial court to make any desired objections to the jury instructions, Respondent's counsel merely requested a peremptory instruction that the jury find in favor of Respondent on the grounds stated in its motion for directed verdict.[1] Respondent's motion for directed

---

[1] The colloquy between the court and Respondent's counsel was as follows:

The Court:

verdict did not contend that the dealer agreement gave General Motors an absolute, unchallengable right to refuse Hubbard's relocation request. (R. 7, p. 113-115, R. 9, pp. 128-131, Appendix D and E). Breach of the implied covenant of good faith and fair dealing was the sole theory of liability considered by the jury, which found in favor of Petitioner and awarded actual damages of two million dollars.

On appeal, the gravamen of the Fifth Circuit Court of Appeals' reversal of this verdict was that the implied covenant of good faith and fair dealing was inapplicable to the instant dispute. Rejecting Petitioner's claims that Respondent waived its challenge to the applicability of the implied covenant, the Fifth Circuit Court of Appeals responded by stating "GM contested the implied good faith covenant's applicability in its motion for summary judgment, both motions for directed verdict and the brief submitted in support of those motions, and in its motion for J.N.O.V. The district court also rejected a proposed GM jury instruction that excluded the good faith issue from jury consideration." 873 F.2d at 876 n.1.

The record demonstrates that this statement is patently incorrect. Rather, Respondent's counsel merely asserted as partial grounds for a directed verdict that "the Plaintiff has failed to offer evidence which, when viewed in the

---

> . . . Does the Defendant have any objections to the jury charges given or request any additional instructions?
>
> Mr. Wise:
>
> Defendant only requests D-1, your Honor, for the grounds already stated in its motions for directed verdict, defending the issues of both liability and damages, that there is no jury issue.
>
> The Court:
>
> Alright, so that is the instruction marked refused. Will you get the jury, please?

(R. 10, p. 14, Appendix C).

light most favorable to Plaintiff, amounts to a breach of the implied covenant of good faith and fair dealings . . .," and thereafter alluded to the specification of Utica, Mississippi, as the dealership location in the franchise agreement. (R. 7, pp. 113-115, Appendix D). Respondent's counsel made no direct claim that the good faith covenant was simply *inapplicable* because of the dealer agreement. The second motion for directed verdict, made at the close of all the evidence, manifestly failed to raise the issue of applicability of the good faith covenant . (R. 9, pp. 128-131, Appendix E). No brief was filed with this motion. Furthermore, Respondent's trial brief on the good faith covenant issue, which was not filed of record, devoted only three paragraphs of its ten-page length to the effect of the dealer agreements. (Appendix F).

Similarly, any contention in the motion for summary judgment that the good faith covenant was inapplicable was decidedly oblique. Respondent's motion for summary judgment stated that "[t]he dealer sales and service agreements entered into by Hubbard Chevrolet and GM in 1980, 1984, and 1985, in identical terms specify Utica as the agreed upon location of operations of Hubbard Chevrolet." The motion failed to draw any legal conclusion directly related to this mere assertion of fact. (Appendix G). In its brief supporting its motion for summary judgment, Respondent directly argued the effect of the dealer agreements' language only in the context of whether Respondent exercised "coercion" or "intimidation" for purposes of determining good faith under the Federal DDCA. (Appendix H). In the one page Respondent devoted to Petitioner's claim for breach of the implied covenant of good faith and fair dealing, Respondent asserted only that "GM has not hindered Hubbard's performance of the dealer agreement."

It was not until Respondent submitted its brief in support of its motion for J.N.O.V., or, in the alternative,

for new trial or remittitur that Respondent made any effort to assert the inapplicability of the good faith covenant as a defense. In its initial and reply briefs supporting its motion for J.N.O.V., Respondent included sections arguing that "Plaintiff has yet to show that the covenant of good faith could be applied to imply obligations on General Motors inconsistent with the dealer agreements." (Appendixes I and J). The arguments contained in the J.N.O.V. brief, of course, were not raised until after the jury verdict, and thus do not satisfy the requirements of Fed. R. Civ. P. 51. Moreover, it is well settled in the Fifth Circuit Court of Appeals, as in every other federal court, that if a party fails properly to assert a motion for directed verdict based upon a particular legal issue, the party also waives the right to seek a judgment *non obstante veredicto* based upon the same legal issue. *See, e.g., Hamman v. Southwestern Gas Pipeline, Inc.*, 821 F.2d 299, 307 (5th Cir.), *vacated in part*, 832 F.2d 55 (1987).

In short, the Fifth Circuit Court of Appeals' assertion that Respondent effectively contested the applicability of the good faith covenant at points during the trial other than the rendering of jury instructions is not supported in the record. Even assuming *arguendo*, however, that one could reasonably conclude that Respondent timely brought this issue to the trial court's attention to enable correction of claimed error, certiorari should be granted in this case to resolve the issue of Fed. R. Civ. P. 51's role in a case wherein an appellant has raised a legal issue only at a point during the trial other than the rendering of jury instructions pertaining directly to that issue.

The circuit courts of appeals' decisions on this subject are hopelessly at odds with one another. On the one hand, some circuits have taken a relatively lenient approach, holding that objections made at points at trial other than the rendering of jury instructions sufficiently

preserve issues for appeal even if specific objections have not been made to a jury instruction concerning the legal issue being appealed. *See, e.g., Hamman, supra,* at 303 (addressing issue in trial briefs and pretrial order preserves issue for appeal); *Biundo v. Old Equity Life Ins. Co.*, 662 F.2d 1297, 1300 (9th Cir. 1981) (vague expression of dissatisfaction with instruction sufficient); *Mark Seitman & Assoc., Inc. v. R.J. Reynolds Tobacco Co.*, 837 F.2d 1527, 1530-31 (11th Cir. 1988) (vague expression of dissatisfaction with instruction sufficient); *Transcontinental Leasing, Inc. v. Michigan Nat'l Bank*, 738 F.2d 163, 167 (6th Cir. 1984) (objection at charge conference sufficient).

On the other hand, other circuits have taken a directly contrary approach, holding that just because a party has objected in principle before or during trial does not mean that party can forego the formality of objecting to the jury instruction itself. *See, e.g., Farmland Ind. v. Frazier-Parrott Commodities, Inc.*, 871 F.2d 1402, 1408 (8th Cir. 1989) (tender of alternative instruction without formal objection to allegedly objectionable instruction is insufficient); *Aspen Highland Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1514 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985) (objection at charge conferences, in trial brief and in motion for directed verdict insufficient); *Larue v. National Union Elec. Corp.*, 571 F.2d 51, 56 (1st Cir. 1978) (no request for instruction concerning disputed issue, together with appeal of denial of directed verdict and J.N.O.V. motions, does not serve to preserve issue); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 675 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986) ("in a civil case each party must live with the legal theory reflected in instructions to which it does not object . . .").

Even this Court has rendered decisions which are difficult to reconcile regarding the necessity of making formal objection to jury instructions and the effect of Fed.

R. Civ. P. 51. In *Springfield v. Kibbe*, 480 U.S. 257 (1987), this Court refused to decide one of the key issues in a section 1983 case because the party seeking to argue the issue had failed to object to a jury instruction. This Court stated, "We think . . . that there would be considerable prudential objection to reversing a judgment because of instructions that [the losing party] accepted. . . ." 480 U.S. at 259. That decision was reached even though, as the dissent noted, the petitioner city raised the legal issue in its motions for directed verdict and for judgment notwithstanding the verdict. 480 U.S. at 264.

This Court took a somewhat different approach in *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), holding that because the focus of petitioner's challenge was not on the jury instruction itself, but rather on the denial of its motions for summary judgment and directed verdict, Fed. R. Civ. P. 51 should not operate as a detriment or bar to appellate review. This Court, citing the dissent in *Kibbe*, *supra*, found that "[a]lthough the same legal issue was raised both by those motions and by the jury instruction, the failure to object to an instruction does not render the instruction the law of the case for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict." 485 U.S. at 119.

These decisions have spawned confusion in the lower courts. For example, in *Benigni v. City of Hemet*, 879 F.2d 473, 476 (9th Cir. 1988), *reh'g denied*, 882 F.2d 356 (9th Cir. 1989), appellants moved for a summary judgment, directed verdict and J.N.O.V., but only asserted those on the basis that appellee's claims were unsupported by the evidence, rather than that the case was improperly submitted to the jury on non-applicable legal theories. The court therefore distinguished *Praprotnik* on the basis that the pertinent legal arguments were not advanced during these motions, and held that appellants

failed to preserve legal issues for appeal by failing to object to jury instructions as required by Fed. R. Civ. P. 51. 879 F.2d at 476. Such a holding is directly in conflict with the instant case, wherein the same set of circumstances existed.

The instant case presents an ideal procedural posture to enable a resolution of the inconsistencies between the above-cited decisions of the federal appellate courts. First, as has been pointed out, Respondent made no apparent assertion in the trial court that the good faith covenant was inapplicable because of the language of the dealership agreement until its J.N.O.V. brief.

It is significant that the pre-trial, trial and post-trial briefs, wherein were made most of Respondent's purported efforts to raise the issue of the applicability of the good faith covenant, did not become part of the record in this case until after it had been appealed to the Fifth Circuit Court of Appeals. Respondent made a special motion to the Fifth Circuit Court of Appeals, pursuant to Fed. R. App. P. 10(e), for leave to supplement the record on appeal with these briefs, manifestly for the reason that the issue of the applicability of the good faith covenant had not been effectively presented by Respondent in the trial court record itself.

Respondent did not appeal the denial of its motions for summary judgment, directed verdict or J.N.O.V., but rather appealed the jury verdict itself. The Fifth Circuit Court of Appeals itself acknowledged this fact when it stated: "*Turning to GM's challenge to the jury verdict*, we agree that the implied covenant of good faith and fair dealing does not apply to this relocation dispute as a matter of law." 873 F.2d at 876 (emphasis supplied). The Fifth Circuit Court of Appeals' refusal to recognize Fed. R. Civ. P. 51 despite the above-described procedural aspects of this case renders it particularly appropriate as a vehicle for this Court to resolve the above-described appealability issue.

In summary, there are three important reasons that certiorari should be granted to address the issue of whether Respondent preserved the legal issue of the applicability of the good faith covenant even though it failed to object, as required by Fed. R. Civ. P. 51, to a jury instruction which presumed that the good faith covenant was potentially applicable. First, the instant case is in an excellent procedural posture for this issue to be addressed. Second, the federal circuit courts of appeals and this Court have rendered decisions which are inconsistent with one another and need to be reconciled. Finally, the Fifth Circuit Court of Appeals manifestly erred in claiming that Respondent effectively raised the issue of the applicability of the good faith covenant at the trial court level. Based upon the foregoing arguments and authorities, Petitioner respectfully requests this Court to grant its petition for writ of certiorari on this issue.

II. THE FIFTH CIRCUIT COURT OF APPEALS' INCORRECT HOLDING THAT THE MISSISSIPPI MVCL IS CONGRUENT WITH THE FEDERAL DDCA CREATES AN IMPROPER PREEMPTION OF SUCH STATE LAW.

A. Statutes Involved.

The Federal DDCA provides that an automobile dealer may bring suit against an automobile manufacturer for failing to "act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise. . . ." 15 U.S.C. § 1222.

Section 1221(e) defines "good faith" as acting "in a fair and equitable manner . . . so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party . . . ."

The Mississippi MVCL, Miss. Code Ann. § 63-17-73 (1)(d) (1972) (Appendix K), provides that it is illegal

for an automobile manufacturer: "2. To coerce, or attempt to coerce any motor vehicle dealer to enter in any agreement . . . ." Miss. Code Ann. § 63-17-55(17) (1972) defines the term "coerce" as meaning "the failure to act in good faith in performing or complying with any terms or provisions of the franchise or agreement." (Appendix L).

Section 63-17-73(1)(d)3. makes it illegal for a manufacturer "[t]o terminate or cancel the franchise or selling agreement of any such dealer without due cause." Section 63-17-73(1)(d)9. makes it illegal for an automobile manufacturer "[t]o prevent or attempt to prevent by contract or otherwise any motor vehicle dealer . . . from selling or transferring any part of the interest [in the dealership] to any other person . . . . However, no dealer . . . shall have the right to sell, transfer or assign the franchise or any right thereunder without the consent of the manufacturer . . . ."

B. The Court of Appeals' Application of the Preemption Doctrine.

Petitioner Hubbard Chevrolet Company argued in the district court that Respondent General Motors had violated the Mississippi MVCL when it required Hubbard to either sign the dealer agreements presented by General Motors in 1980, 1984 and 1985 and the premises addenda requiring Hubbard to remain in Utica or give up its Chevrolet franchise. Hubbard contended that General Motors also violated subsection (d)(9) of the Mississippi MVCL when it wrote Hubbard that GM would not approve a transfer of the dealership to any third party. Hubbard further contended that GM violated subsection (d)(3) of the Mississippi MVCL when it forced Hubbard to close by refusing relocation, taking the majority of Hubbard's APR from it, and writing Hubbard that it would prohibit any transfer of the dealership.

The district court granted summary judgment in favor of GM on the Mississippi MVCL claims of Hubbard, based upon its reading of the Mississippi statute as being congruent with the federal statute. The Fifth Circuit Court of Appeals affirmed this grant of summary judgment on the same grounds, despite the plainly differing language of the two statutes and in spite of the fact that the Mississippi MVCL was enacted in 1970, fourteen years after the Federal DDCA.

There being no legislative history for guidance, the Mississippi MVCL should be interpreted according to its actual language, which creates a broader standard of good faith conduct than that established by the Federal DDCA. The Fifth Circuit Court of Appeals' negation of the broader standard established by the state statute constitutes an improper preemption of the state statute by the Federal DDCA and raises an important question regarding the proper application of the supremacy clause of the United States Constitution.

The supremacy clause of the Constitution provides in pertinent part that the laws of the United States are the law of the land, notwithstanding any state law to the contrary. U.S. Const. art 6, cl. 2. State authority can be preempted by federal law in three ways. Congress may preempt state law by way of an express statement. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, a court may determine that Congress intended to occupy an entire field of regulation, leaving the states no room to supplement federal law. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Finally, Congress may preempt state law "to the extent that it actually conflicts with federal law." *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983). Such a conflict generally exists when compliance with both the federal law and the state law is physically impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-45

(1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Congressional intent to preempt state law is not to be lightly presumed. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). "Proper respect . . . for the independent sovereignty of the several states requires that federal supremacy be invoked only where it is clear that Congress so intended." *Penn Terra Ltd. v. Department of Envtl. Resources*, 733 F.2d 267, 273 (3d Cir. 1984). Statutes should be construed to avoid preemption "absent an unmistakable indication to the contrary." *Id.*

The Fifth Circuit Court of Appeals has improperly applied the supremacy clause of the Constitution to construe the Mississippi MVCL as being coextensive with the Federal DDCA. The DDCA defines "good faith" as "the duty of each party . . . to guarantee . . . freedom from coercion, intimidation, or threat of coercion or intimidation from the other party . . . ." 15 U.S.C. § 1221(e). The Mississippi statute generally defines "good faith" in the same terms as the Federal DDCA. *See* Miss. Code Ann. § 63-17-55(16) (1972). Although the Federal DDCA does not attempt to define "coercion." The Mississippi statute does do so, defining "coerce" as "the failure to act in good faith in performing or complying with any terms or provisions of the franchise or agreement." Miss. Code Ann. § 63-17-55(17). The Fifth Circuit Court of Appeals held that "Hubbard points to no evidence indicating that the Mississippi statute's further definition of 'coerce' represents an effort to broaden the scope of 'good faith.' We decline to read a broader definition into the Mississippi statute." 873 F.2d at 876.

In reaching this conclusion, the Fifth Circuit Court of Appeals does not explicitly contend that it is construing

the Mississippi statute in this fashion because of the supremacy clause of the Constitution. In effect, however, the Fifth Circuit Court of Appeals' refusal to apply any meaning to the Mississippi statute's further definition of "coerce" and its other differing language constitutes an application of the supremacy clause just as surely as if the Fifth Circuit's holding had been explicitly based on this rationale. As a matter of law the supremacy clause of the Constitution has been improperly applied in the instant case.

Congress has not expressly stated an intent that the Federal DDCA preempt state motor vehicle franchise laws. In fact, the Federal DDCA expressly provides that it shall not invalidate any state law "except insofar as there is a direct conflict between an express provision of [the Federal DDCA] and an express provision of state law which cannot be reconciled." 15 U.S.C. § 1225.

Similarly, there is no indication that Congress intended to occupy the entire field of regulating the relationship between manufacturers and their dealers. *See, e.g., General Motors Corp. v. Gallo GMC Truck Sales, Inc.*, 711 F. Supp. 810, 821 (D.N.J. 1989). Finally, there is no actual conflict between the Federal DDCA and the Mississippi MVCL. Under the proper interpretation of the term "good faith" in the Mississippi MVCL, a common-law good faith standard should be applied in determining whether Respondent has violated the state statute. Thus, the Mississippi MVCL actually furthers the Congressional purpose behind the Federal DDCA of balancing unequal bargaining power and eliminating abuse by providing an even higher degree of protection for franchisees than that afforded dealers by the Federal DDCA. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). While the Mississippi MVCL's protection of the rights of franchisees is broader, it is not contrary to the policy underlying the Federal DDCA, and thus is not

in conflict with it. *Gallo GMC Truck Sales, supra*, 711 F. Supp. at 821.

The Fifth Circuit Court of Appeals' attempt to create a preemption of the Mississippi MVCL by the Federal DDCA is in direct conflict with at least one other circuit court of appeals. In *Carroll Kenworth Truck Sales, Inc. v. Kenworth Truck Co.*, 781 F.2d 1520, 1528 (11th Cir. 1986), the Eleventh Circuit Court of Appeals reversed a jury verdict in favor of a dealer under the Federal DDCA, but upheld the verdict in its favor under the Alabama Motor Vehicle Franchise Act. In doing so, the court reasoned:

> Although Alabama courts have not yet interpreted this statute, a literal reading reveals a more liberal definition of good faith than is found in its federal counterpart. As a federal court interpreting a state statute, it is not our role to pass on the wisdom of a state legislative policy choice. We must accept the decision of the Alabama state legislature to make it easier for terminated dealers to succeed against manufacturers under Alabama law than they can under federal law.

Id. at 1528.

Similarly, in the instant case, a correct, literal reading of the term "coerce" as defined in Miss. Code Ann. § 63-17-55(17) (lack of good faith), as well as subsections (d)3 and (d)9, compels the conclusion that the Mississippi MVCL was intended to create a broader range of prohibited acts than was contemplated by the United States Congress in enacting the Federal DDCA.

The added section in the Mississippi statute defining the term "coerce" as "the failure to act in good faith . . ." has the effect of reverting the meaning of the term "good faith" in the Mississippi statute to the same common-law standard applied with respect to the implied covenant of good faith and fair dealing. By refusing to honor the statutory definition of "coerce" as "lack of good

faith as that term is commonly understood," the lower court applied a circular logic which negates the meaning and applicability of the statutory definition. This violates a cardinal principle of statutory construction requiring a court to give effect, if possible, to every word the legislature uses; a statute should be interpreted so as not to render one part inoperative. *Reiter v. Sonotone Corp.*, 442 U.S. 330, *on remand*, 602 F.2d 179 (8th Cir. 1979), *on remand*, 486 F. Supp. 115 (D. Minn. 1980).

In summary, certiorari should be granted with respect to the Fifth Circuit Court of Appeals' improper application of the supremacy clause of the Constitution. There is a conflict between circuit courts of appeals concerning this issue, and the holding is patently erroneous.

III. THE FIFTH CIRCUIT COURT OF APPEALS' HOLDING THAT THE GOOD FAITH COVENANT WAS INAPPLICABLE CONFLICTS WITH DECISIONS BY OTHER CIRCUIT COURTS OF APPEALS AND BY MICHIGAN COURTS.

The Fifth Circuit Court of Appeals held that discretionary acts of Respondent in performing under the Dealer Agreement were not subject to the implied covenant of good faith and fair dealing because the parties put no language in the contract bringing the covenant "into play." 873 F.2d at 878. This holding should be reviewed by this Court because it directly conflicts with decisions issued by other circuit courts of appeals and Michigan appellate courts, and because it is patently erroneous.

The Fifth Circuit Court of Appeals' opinion directly contradicts the position taken by other circuit courts of appeals addressing the degree to which the good faith covenant applies to contracts. These other courts have ruled that a provision in an agreement granting discretion to one party does not remove all expectations that exercise of an option may be limited by good faith con-

cerns. *See, e.g., Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1153-54 (D.C. Cir. 1984); *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1267-69 (10th Cir. 1988); *Entré Computer Centers v. FMG of Kansas City, Inc.*, 819 F.2d 1279, 1284 (4th Cir. 1987); *Brown v. AVEMCO Investment Corp.*, 603 F.2r 1367, 1378 (9th Cir. 1979); *Larese v. Creamland Dairies, Inc.*, 767 F.2d 716, 717 (10th Cir. 1985).

The rationale underlying these decisions is effectively expressed in *Big Horn Coal Co., supra*, where the court stated:

> [The contractual provision] expressly grants Edison the power to reduce the quantity of coal supplied, but it cannot be said to confer an unfettered power that can be used at any time with or without cause. The 'mere recitation of an express power' does not in itself preclude the implication of good faith requirements. *Tymshare*, 727 F.2d at 1153. '[T]o say that every expressly conferred contractual power' removes all the parties of this unexpressed—but reasonable—expectations, would virtually 'read the doctrine of good faith (or of implied contractual obligations and limitations) out of existence.' *Id.* at 1154.

852 F.2d at 1268.

No reasonable reading of the dealer agreements' language can lead one to infer the type of "unfettered power that can be used at any time with or without cause" which eliminates the good faith covenant. Rather, this language on its face merely confers *discretion* on Respondent to approve or disapprove a relocation request by requiring Respondent's written consent to a proposed move. The dealer agreements' language thus creates precisely the type of discretionary right which Michigan courts hold brings the good faith covenant into play (*Burkhardt v. City Nat'l Bank*, 57 Mich. App. 649, 226 N.W.2d 678, 680 (1975)), rather than the termination-at-will provision at issue in *Bushwick-Decatur Motors v. Ford Motor Co.*, 116 F.2d 675, 676 (2d Cir. 1941)

("[t]his agreement may be terminated at any time at the will of either party . . ."). The Fifth Circuit Court of Appeals' decision thus conflicts directly with Michigan law and should be reviewed to correct this clear error.

Moreover, the national importance of this decision cannot be ignored. This decision renders the good faith covenant virtually inapplicable to any agreement where good faith duties are not explicitly iterated in the agreement itself. The reasoning underlying this decision automatically precludes application of the good faith covenant each and every time any discretion is recited in a contract. Parties seeking good faith constraints on other parties to an agreement are thus unfairly compelled to assert contractual language explicitly creating a "reasonable expectation" that the other party will exercise contractual discretion in good faith, regardless of whether surrounding circumstances dictate the necessary existence of such an expectation.

Of course, in a franchisor-franchisee relationship, as in many business contracts, the franchisee has absolutely no option to insert such language, but instead must accept the offered contract on a "take-it-or-leave-it" basis. The intolerable burden this places upon parties with lesser bargaining power has been utterly rejected by Michigan courts, which have applied the principle of unconscionability to preclude results such as that in the instant case. *See, e.g., Allen v. Michigan Bell Tel. Co.*, 171 N.W.2d 689, 18 Mich. App. 632 (1969), *appeal after remand*, 232 N.W.2d 302, 61 Mich. App. 62 (1975).

Finally, the patent erroneousness of the Fifth Circuit Court of Appeals' opinion is emphasized by the fact that it addressed only Respondent's refusal to permit relocation and ignored essential elements of Respondent's overall pattern of misconduct. Respondent took a series of steps, of which the refusal to permit relocation was only one element, which inexorably and inevitably

squeezed Hubbard out of existence. First, Respondent repeatedly spurned Petitioner's pleas to obtain permission to relocate from Utica, Mississippi, to Raymond, Mississippi, a growing suburban community which was the only location in the Petitioner's selling territory from which it could continue to operate a viable dealership. Then, in 1984, Respondent removed Raymond from Petitioner's territory, thus precluding Petitioner from ever moving to Raymond and condemning it to its nonviable Utica location. Finally, in October, 1985, Respondent sent Petitioner its letter informing Petitioner that any potential buyer of the dealership would not be approved as a Chevrolet franchisee, which in turn rendered the dealership unmarketable. It was this combination of actions by Respondent which compelled Petitioner to cease operations without selling the dealership in September, 1987. The Fifth Circuit Court of Appeals' inexcusable failure to address this pattern of misconduct, focusing solely on one aspect of that pattern—the relocation refusal—even though the jury based its verdict upon GM's overall pattern of misconduct, in itself warrants the granting of this petition.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

CHARLES R. DAVIS
THOMAS, PRICE, ALSTON, JONES & DAVIS
121 North State Street
Post Office Drawer 1532
Jackson, Mississippi 39215-1532
Telephone: (601) 948-6882
Attorney for Petitioner

APPENDICES

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-4302

HUBBARD CHEVROLET CORPORATION,
Plaintiff-Appellee, Cross-Appellant,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellant, Cross-Appellee.

May 30, 1989

Rehearing and Rehearing En Banc
Denied June 28, 1989

Stephen M. Shapiro, Chicago, Ill., Natie P. Caraway, Joseph P. Wise, Robert P. Wise, Jackson, Miss., for defendant-appellant, cross-appellee.

Kenneth A. Rutherford, Dale F. Schwindaman, Jr., Jackson, Miss., for plaintiff-appellee, cross-appellant.

Appeals from the United States District Court for the Southern District of Mississippi.

Before THORNBERRY, WILLIAMS and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

General Motors Corporation appeals a $2 million jury verdict for breach of an implied covenant of good faith awarded to the plaintiff, a Chevrolet dealer, after GM

refused the dealer's requests to relocate the dealership. The dealer cross-appeals the district court's grant of summary judgment on its claim under the Mississippi Motor Vehicle Commission Law. We reverse the judgment entered on the jury verdict and affirm the district court's dismissal by summary judgment of the dealer's statutory claim.

I.

Hubbard Chevrolet Co. operated a dealership in Utica, Mississippi from 1927 until 1987. The dealership agreement between Hubbard and General Motors specified Utica, population 1,000, as Hubbard's only authorized location. The agreement required GM's written approval for any change of dealership location.

Although Hubbard posted profits throughout the 1970s, Utica's lack of highway access, eroding population base and declining economy prompted Hubbard to request relocation in 1980. Hubbard was losing money by that time; it ultimately closed its doors in 1987. Hubbard wanted to move the dealership eighteen miles northeast to Raymond, Mississippi, a growing town of about 2,000 at that time located three miles from Jackson, the state capital. Hubbard bought property on the Jackson side of Raymond in 1979 in anticipation of the move.

In 1979, Raymond was located just within Hubbard's Area of Primary Responsibility (APR), the market area in which GM measures dealer sales and service performance. GM also estimates a dealer's potential for new car and truck sales based on new car registrations in the dealers' APR.

GM contends that it must maintain firm control over dealer location to insure adequate availability of dealer services for customers, and to assure dealers that they will earn a reasonable return on their investment. A dealer network planning consultant for GM testified that unilateral dealer location decisions would create chaos

given that individual dealers—focusing only on their own best sales prospects—would ignore more stable areas. GM also presented evidence that it avoids placing dealerships in locations where survival would require them to sell vehicles in fellow dealers' APRs.

GM had assigned Jackson, the state's largest city, to other Chevrolet dealers in a separate Multiple Dealer Area (MDA). GM refused Hubbard's initial 1980 relocation request and its renewed requests from 1982 through 1985. GM did, however, offer to help Hubbard relocate to a larger dealership in Eunice, Louisiana.

GM cited four reasons for its refusal to approve Hubbard's relocation to Raymond: (1) GM's desire to maintain a Chevrolet dealer in Utica; (2) its concern that Hubbard wanted to poach on the Jackson MDA by virtue of Raymond's proximity to Jackson, rather than serve customers in Hubbard's own APR; (3) GM's desire to preserve its option to place a third dealer in Jackson or a nearby town at an optimal location; and (4) the conclusion that Hubbard's relocation to Raymond would not generate a sufficient sales increase to offset the costs. Hubbard contended that GM created makeweight arguments to camouflage a decision based on cronyism and the desire to insulate the Jackson dealers from any competition.

In 1984, GM halved Hubbard's APR and reassigned Raymond to the Jackson MDA. GM said the reassignment resulted from a national study of the proper APR's for forty cities; it reasoned that Raymond should join the Jackson MDA because Raymond customers gravitate to the bigger city to buy their goods and services. Hubbard noted that very few MDA changes reduced a dealer's territory by fifty percent and portrayed the change as another instance of GM favoritism. The reduction of Hubbard's APR cut its planning potential but did not preclude Hubbard from selling cars to Raymond residents.

Hubbard renewed its relocation request in 1985. GM responded with a letter repeating its justifications for reassigning Raymond to the Jackson APR. The letter also stated that vehicle registration records indicated Utica would not be a profitable location for any future Chevrolet dealer and that GM would not continue dealer representation there. However, GM told Hubbard that it would continue to meet its obligations under the dealer agreement as long as Hubbard remained in Utica.

Hubbard sued GM in 1985 alleging that GM's refusal of Hubbard's relocation requests (1) breached its fiduciary duty; (2) breached an implied covenant of good faith and fair dealing; (3) constituted tortious interference with Hubbard's prospective Raymond customers; and (4) violated the federal Automobile Dealers' Day in Court Act and an analogous Mississippi statute. The district court granted summary judgment for GM on the tortious interference and statutory claims. *Hubbard Chevrolet Co. v. General Motors Corp.*, 682 F.Supp. 873 (S.D.Miss. 1987).

Ultimately, only the claim for breach of the implied good faith covenant went to the jury. The jury returned a $2 million verdict in Hubbard's favor, and the court entered judgment in that amount. GM appeals the judgment entered on the jury verdict; Hubbard appeals the district court's summary judgment in favor of GM on Hubbard's Mississippi Motor Vehicle Commission Law claim.

II.

A.

We first examine Hubbard's challenge to the district court's dismissal of Hubbard's claim under the Mississippi Motor Vehicle Commission Law, Miss.Code Ann. § 63-17-51 *et seq.*, following the court's favorable ruling on GM's motion for summary judgment. Summary judgment is proper when the record raises no issue of material fact

and the movant is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c). We conclude that the district court properly granted summary judgment on this claim.

The district court granted summary judgment on Hubbard's parallel claim under the federal Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221 *et seq.*, because Hubbard's proof did not establish that GM had violated the Act's special "good faith" standard. The DDCA allows a dealer to sue a manufacturer for damages caused "by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms and provisions of the franchise or in terminating, canceling or not renewing the franchise with said dealer. . . ." 15 U.S.C. § 1222. The Act defines "good faith" as the "duty of each party . . . to guarantee . . . freedom from coercion, intimidation, or threat of coercion or intimidation from the other party . . . ." 15 U.S.C. § 1221(e).

The district court noted that arbitrary actions by a manufacturer, standing alone, do not rise to the level of coercion and intimidation set out in the DDCA's narrow "good faith" definition. *Hubbard Chevrolet*, 682 F.Supp. at 877. *See also McDaniel v. General Motors Corp.*, 480 F.Supp. 666 (E.D.N.Y.1979), *aff'd*, 628 F.2d 1345 (2d Cir.1980); *Southern Rambler Sales Inc. v. American Motors Corp.*, 375 F.2d 932 (5th Cir.), *cert. denied*, 389 U.S. 832, 88 S.Ct. 105, 19 L.Ed.2d 92 (1967). The court concluded that Hubbard's summary judgment evidence regarding the refused relocation requests failed to support allegations of coercion or intimidation. *Hubbard Chevrolet*, 682 F.Supp. at 877. Hubbard does not challenge that ruling on appeal.

Instead, Hubbard argues that the district court erroneously granted summary judgment on its claim under the analogous Mississippi statute. That statute targets the same conduct as the federal act and defines "good

faith" in the same terms as the DDCA. *See* Miss.Code Ann. §§ 63-17-73(1)(d), 63-17-55(16). Unlike the federal act, however, the Mississippi act then defines "coerce" as "the failure to act in good faith in performing or complying with any terms or provisions of the franchise or agreement." Miss.Code Ann. § 63-17-55(17). Hubbard relies on this difference to argue that the Mississippi statute incorporates a broader common law meaning of "good faith."

We reject this argument. Mississippi promulgated its statute after Congress enacted the DDCA, and in so doing it adopted the federal act's definition of "good faith." Hubbard points to no evidence indicating that the Mississippi statute's further definition of "coerce" represents an effort to broaden the scope of "good faith." We decline to read a broader definition into the Mississippi statute. *See Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701-02, 66 L.Ed.2d 633 (1981) (Congress presumed to have adopted existing judicial constructions of definition in Uniform Sales of Securities Act when it used that definition in Securities Act of 1933). *See also Southern Rambler Sales*, 375 F.2d at 935; *Globe Motors v. Studebaker-Packard Corp.*, 328 F.2d 645, 648 (3d Cir. 1964); *Frank Chevrolet v. General Motors Corp.*, 304 F.Supp. 307, 316 (N.D. Ohio 1968), *aff'd*, 419 F.2d 1054 (6th Cir.1969); *Berry Bros. Buick, Inc. v. General Motors Corp.*, 257 F.Supp. 542, 546 (E.D.Pa.1966), *aff'd*, 377 F.2d 552 (3d Cir.1967). As with the federal DDCA, the district court correctly concluded that Hubbard's allegations of arbitrary conduct did not rise to the level of coercion and intimidation required by the Mississippi statute.

B.

Turning to GM's challenge to the jury verdict, we agree that the implied covenant of good faith and fair

dealing does not apply to this relocation disputes as a matter of law.[1]

Michigan common law, which controls under the dealer agreement, recognizes an implied covenant of good faith and fair dealing that applies to the performance and enforcement of contracts. *Ferrell v. Vic Tanny Int'l, Inc.*, 137 Mich.App. 238, 357 N.W.2d 669, 672 (1984); *Burkhardt v. City National Bank of Detroit*, 57 Mich.App. 649, 226 N.W.2d 678, 680 (1975). Generally speaking, the implied covenant seeks to protect the contracting parties' reasonable expectations. *Compare Restatement (Second) of Contracts* § 205(a) ("Good faith . . . emphasizes consistency with the justified expectations of the other party; it excludes [conduct that violates] . . . community standards of decency, fairness or reasonableness") with Burton, *More on Good Faith Performance of a Contract*, 69 Iowa L.Rev. 497, 500 ("[B]ad faith performance occurs . . . when discretion is used to recapture opportunities forgone upon contracting—when the . . . party [who exercises discretion] refuses to pay the expected cost of performance.").

The implied covenant of good faith and fair dealing essentially serves to supply limits on the parties' conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms. *See Bushwick-*

---

[1] Hubbard argues initially that GM waived its challenge to the implied good faith issue because GM did not challenge the issue's submission before its initial motion for directed verdict, in its second motion for directed verdict, or in its objections to the court's instructions.

The record contradicts Hubbard's assertions. GM contested the implied good faith covenant's applicability in its motion for summary judgment, both motions for directed verdict and the brief submitted in support of those motions, and in its motion for judgment NOV. The district court also rejected a proposed GM jury instruction that excluded the good faith issue from jury consideration. GM preserved its argument for appellate review. *See Industrial Dev. Bd. v. Piqua Indus.*, 523 F.2d 1226, 1238 (5th Cir. 1975).

Decatur Motors v. Ford Motor Co., 116 F.2d 675, 677 (2d Cir.1940) (applying Michigan law); *Ferrell*, 357 N.W.2d at 672; Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv.L.Rev. 369, 380 (1980). Consistent with this supplementing function, Michigan courts rely on the implied good faith covenant "[w]here a party to a contract makes the manner of its performance a matter of its own discretion. . . ." *Burkhardt*, 226 N.W. 2d at 680; *see also Ferrell*, 357 N.W.2d at 672.[2]

Michigan law does not imply the good faith covenant where parties have "unmistakably expressed" their respective rights. *Bushwick-Decatur Motors*, 116 F.2d at 675; *see also* Burton, 69 Iowa L.Rev. at 500 ("Both the U.C.C. and the common-law cases make clear that the parties are free to determine by agreement what good faith will permit or require of them."). For example, in interpreting Michigan law the Second Circuit declined to limit an explicit at-will termination power granted both parties to a dealership contract. *Bushwick-Decatur Motors*, 116 F.2d at 675. This is consistent with our own conclusion that "[t]he implied obligation to execute a contract in good faith usually modifies the express terms of the contract and should not be used to override or contradict them." *Domed Stadium Hotel, Inc. v. Holiday*

---

[2] While the Michigan cases do not define "discretion," we look to this discussion:

> Discretion in performance arises in two ways. The parties may find it to their mutual advantage at formation to defer decision on a particular term and to confer decisionmaking authority as to that term on one of them. Discretion also may arise, with similar effect, from a lack of clarity or from an omission in the express contract. In either case, the dependent party must rely on the good faith of the party in control. Only in such cases do the courts raise explicitly the implied covenant of good faith and fair dealing, or interpret a contract in light of good faith performance.

Burton, 94 Harv.L.Rev. at 380 (footnotes omitted).

Inns, Inc., 732 F.2d 480, 485 (5th Cir.1984) (applying Louisiana law).

As a threshold matter, then, we must determine whether this dispute and the contract language governing it bring the covenant into play.

The contract at issue here consists of a Dealer Sales and Service Agreement and a Dealership Location and Premises Addendum. In Art. II § B(1), the dealer agreement provides that "Dealer will conduct the Dealership Operations only from the location . . . approved for that purpose by General Motors. . . ." Under § B(2) a dealer who want to relocate "agrees to give General Motors prior written notice so General Motors can discuss the effect of the proposed change with the Dealer. No change in Dealership Location . . . will be made without the written approval of General Motors."

The Dealership Location and Premises Addendum to Hubbard's dealer agreement specifies Hubbard's location as White Oak Street in Utica. The addendum also states, "All changes in the Dealership Location . . . that may be agreed upon by Dealer and General Motors pursuant to provision of Section B of Article II of the Dealer Agreement(s) . . . shall be reflected in a new Dealership Location and Premises Addendum. . . ."

In defining the contours of the implied covenant in Michigan, we find two cases that are helpful. *Burkhardt*, a leading Michigan case on the implied good faith covenant, examined a mortgage agreement calling for the defendant bank to establish an escrow fund "estimated by the Mortgagee" to be sufficient to pay taxes and insurance. The plaintiff mortgagors argued that the bank's accounting methods created a larger sum than necessary to cover these costs. *Burkhardt*, 226 N.W.2d at 680. The court concluded that the implied covenant of good faith applied by virtue of the mortgagee bank's "considerable" discretion to estimate those sums. *Id.* In so doing the court looked to the parties' expectations that the escrow fund would be "adequate" for taxes and insurance and no more. *See id.*

Relatedly, the Second Circuit—applying Michigan law —rejected application of the implied good faith covenant to a dealership contract allowing termination "at any time at the will of either party by written notice." *Bushwick-Decatur Motors*, 116 F.2d at 676-77.[3] The court concluded,

> With a power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take.

Id.

Applying the precedents to this case, we conclude that the district court erred when it instructed the jury on the implied covenant of good faith and fair dealing; the covenant has no role to play in the relocation dispute between GM and Hubbard. Unlike the discretionary language at issue in *Burkhardt*, this contract language leaves no room for a court or jury to supply limits. These clauses, which specify Hubbard's location at Utica and flatly preclude relocation absent GM's approval, more closely resemble the "unmistakably expressed" terms that excluded the covenant's application in *Bushwick-Decatur Motors*, 116 F.2d at 676-77. The contract does not limit the reasons upon which GM can base its relocation decisions. *See Lichnovsky v. Ziebart Int'l Corp.*, 414 Mich. 228, 324 N.W.2d 732, 736-37 (1982). Hubbard and GM have deferred no decisions regarding relocation or the

---

[3] *But cf. Larese v. Creamland Dairies, Inc.*, 767 F.2d 716, 717 (10th Cir. 1985) (under Colorado law, franchisor cannot unreasonably withhold consent to assignment of franchise rights under contract requiring franchisor's prior written consent to transfers); *Dunfee v. Baskin Robbins, Inc.*, 720 P.2d 1148, 1153-54 (Mont. 1986) (applying duty of reasonableness to invalidate franchisor's refusal to permit franchise to move shop without reference to specific contract language).

relevant factors. They gave GM the authority to approve or disapprove relocation for its own reasons, and thus set out the limits of what the contract requires of these parties.

Hubbard agreed to operate at the specified location and to request relocation in writing. It can point to no portion of this contract creating "reasonable expectations" that GM would grant such requests. The written notice requirement for relocation requests in no way dilutes GM's right to keep the dealership in Utica. Substituting this jury's sense of what GM should have done for what the contract expressly allowed GM to do represents a veto of contractual language that *Bushwick-Decatur Motors* and our own case law counsel us to avoid.

This court's observations regarding provisions permitting terminations at will in *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 138 (5th Cir.), *cert. denied*, 444 U.S. 938, 100 S.Ct. 288, 62 L.Ed.2d 198 (1979) are relevant in this context. In *Corenswet* we refused to apply UCC § 1-203's good faith obligation to override an express provision in a distributorship contract permitting unilateral termination without case. *Id.* The court described the implied good faith standard as an "erratic" test for regulating such terminations and stated, "Since a termination without cause will almost always be characterizable as a 'bad faith' termination, focus on the terminating party's state of mind will always result in the invalidation of unrestricted termination clauses." *Id.* Absent contractual language that brings the implied good faith covenant into play, we decline to allow a jury to reevaluate the wisdom of the parties' choice to leave relocation decisions to GM.

We do not reach the parties' remaining points on appeal. The judgment below is

AFFIRMED in part, REVERSED in part and REMANDED for entry of a take nothing judgment in favor of General Motors.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI
JACKSON DIVISION

Civ. A. No. J85-1178(L)

HUBBARD CHEVROLET COMPANY,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant.

Oct. 1, 1987

Kennth A. Rutherford, Thomas, Price, Alston, Jones & Davis, Jackson, Miss., for plaintiff.

Natie P. Caraway and Joseph P. Wise, Wise, Carter, Child and Caraway, P.A., Jackson, Miss., Edward C. Wolfe, Sr. Counsel, General Motors Corp., Detroit, Mich., for defendant.

MEMORANDUM OPINION AND ORDER

TOM S. LEE, District Judge.

This cause is before the court on the motion of defendant General Motors Corporation (GM) for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff has timely responded to the motion and upon consideration of the memoranda along with attachments submitted by the parties, the court is

of the opinion that the motion should be granted in part and denied in part.[1]

Plaintiff, Hubbard Chevrolet Company (Hubbard), has been in existence as a Chevrolet dealership in Utica, Mississippi since 1927. The president, owner and operator of that establishment is Shelby McKee. During their relationship, the parties have operated under a series of dealer agreements. The agreement in effect at the time relevant to the lawsuit was executed on November 1, 1980 and was for a term of five years. In 1984, Hubbard executed a new agreement, and a new five-year agreement was signed on November 1, 1985. Each of the agreements specifies Utica as the dealership location.

Although Hubbard was generally profitable in the 1970s and sold more new vehicles than the planning potential[2] established by GM, the population of Utica began to decline while the population increased in another town in Hubbard's area of primary responsibility,[3] Raymond, Mississippi. Commencing in 1980, Hubbard unsuccess-

---

[1] This court has jurisdiction pursuant to 28 U.S.C. § 1332. In the complaint, plaintiff alleged that in addition to diversity jurisdiction, this court has pendent jurisdiction to entertain plaintiff's "non-federal" or state law claims. Since diversity jurisdiction is apparent, plaintiff's allegation regarding jurisdiction over pendent state law claims is superfluous.

[2] Planning potential is defined as:

> a conservative, but reasonably expected, annual new car and/or truck unit sales level, for a specific geographic Area of Primary Sales and Service Responsibility, which properly located dealerships with adequate facilities and effective manpower and management should be able to profitably attain therein over the business cycle.

[3] Area of primary responsibility (APR) is described by GM as the market area GM uses to measure a dealer's sales performance. The section of the agreement between the parties provided at Article II(c)(3), "Additional Provisions", that Hubbard's sales performce would be evaluated on the basis of registrations of new Chevrolets in the dealer's APR.

fully sought GM's permission to relocate Hubbard's dealership premises from Utica to Raymond. Then in 1984, GM, through its Chevrolet Division, reduced Hubbard's dealership area of primary responsibility by removing Raymond from the area and assigning it to the Jackson area, and also reduced Hubbard's planning potential by more than fifty percent. According to the allegations of the complaint, GM's refusal to allow the relocation of Hubbard's business premises, coupled with its reduction of Hubbard's area of responsibility and planning potential, have made it impossible for Hubbard to continue as a viable Chevrolet dealership.[4] Plaintiff has alleged several claims against GM; specifically, plaintiff avers that GM's actions constituted a violation of the Automobile Dealer's Day in Court Act (DDCA), 15 U.S.C. § 1221-1225, that GM violated the analogous Mississippi Act, Miss.Code Ann. § 63-17-73 (1972), and that GM is liable for breach of fiduciary duty, breach of the covenant of good faith and fair dealing and interference with prospective business relations. GM has moved for summary judgment on all counts of the complaint.

The Automobile Dealer's Day in Court Act provides that an automobile dealer may bring suit against an automobile manufacturer to

> recover the damages by him sustained . . . by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms and provisions of the franchise or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

---

[4] In addition to those claims, Hubbard has alleged that it requested that it be assigned other GM lines such as Buick and Oldsmobile, but that request was denied by GM. This too, it claims, contributed to what will be its eventual demise.

15 U.S.C. § 1222. Good faith, as that term is defined under the DDCA, is the

> duty of each party . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

15 U.S.C. § 1221(e). Courts construing an automobile manufacturer's "good faith" duty under the DDCA have consistently held that failure to exercise good faith has a limited and restricted meaning and is not to be construed liberally. *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 911 (9th Cir.), *cert. denied*, 436 U.S. 946, 98 S.Ct. 2848, 56 L.Ed.2d 787 (1978). Under the Act, good faith is more limited than a general good faith standard, *In re Frank Meador Buick, Inc.*, 13 B.R. 841, 844 (Bankr.W.D.Va.1981), and mere arbitrariness or bad faith, as that term is generally understood, by the automobile manufacturer is not enough to constitute a violation of the DDCA. *Sink v. Ford Motor Co.*, 549 F.Supp. 245 (E.D.Mich.1982). The question then is *not* whether the manufacturer acted unfairly or inequitably in its business relations with the dealer, but whether the manufacturer failed to act in good faith. *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932 (5th Cir.), *cert. denied*, 389 U.S. 832, 88 S.Ct. 105, 19 L.Ed.2d 92 (1967). To establish a lack of good faith and consequent violation of the Act, the dealer must show that the manufacturer coerced or intimidated the dealer and that the coercion was intended to achieve an objective that was improper or wrongful. *Quarles v. General Motors Corp. (Motors Holding Division)*, 597 F.Supp. 1037 (D.C.N.Y.1984), *aff'd*, 758 F.2d 839 (2nd Cir.1985). "Coercion" or "intimidation" requires a wrongful demand which will result in sanctions if it is not complied with.

Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 683, 685 (6th Cir.1976). In fact, in the absence of a claim that the manufacturer warned the dealer to do or not do a particular act or face termination, there is no "either-or" attempt at coercion or intimidation and hence there can be no recovery under the DDCA, even if the dealer felt that he was being coerced. *Id.*

In the present case, plaintiff claims that GM's course of conduct toward it amounted to lack of good faith as that term is defined under the DDCA. Plaintiff contends that GM's refusal to allow Hubbard to relocate, along with its refusal to approve a successor dealer in Utica, constitutes constructive termination of its dealership, without case, with corecion and without good faith on the part of GM.

The "General Motors Dealer Agreement," which purports to control the relationship between the parties, designates "105 White Oak Street, Utica, Mississippi" as the location at which Hubbard may sell Chevrolet products. It further specifies that Hubbard may not sell Chevrolet products at any other location without the permission of GM.[5] Hubbard states that it is well known that if a dealer violates this provision, he can be terminated by GM. In essence, plaintiff reasons that when defendant refused permission to relocate the dealership to Raymond or, according to plaintiff, to any other location where Hubbard could achieve sufficient sales to survive as a dealership, the threat of termination if Hubbard relocated without approval was well known to Hubbard; thus, the

---

[5] Article II(B)(2), entitled "Changes" states:

> If Dealer desires to make any changes in the Dealership Location or in the uses or purposes of any of the Dealership Premises, Dealer agrees to give [GM] prior notice so [GM] can discuss the effect of the proposed changes with Dealer. No change in Dealership Location or in use of Dealership Premises in Dealership Operations will be made without written approval of GM.

refusal of GM to allow Hubbard to move was absolute and "went beyond mere intimidation to the final act of coercion itself." Additionally, plaintiff alleges that GM in fact terminated Hubbard's dealership by advising that GM would not approve a dealer/operator in Utica after McKee since GM did not plan to continue Chevrolet dealer representation in Utica. Hubbard claims that it is therefore not free to sell its assets or even attempt to find a buyer since GM will not approve a future dealer in Utica. This, it contends, amounts to a "shutting down the dealership point" effective at a future date, which is "the ultimate act of coercion against the dealer."

In the opinion of the court, the conduct complained of by plaintiff does not amount to a lack of good faith by GM under the DDCA. It is essential to Hubbard's claim that it be able to demonstrate either actual or threatened coercion or intimidation. In *McDaniel v. General Motors Corp.*, 480 F.Supp. 666 (E.D.N.Y.1979), *aff'd*, 628 F.2d 1345 (2nd Cir.1980), the court observed that without proof of lack of good faith within the meaning of the DDCA, "there can be no relief under [the Act] . . . even for arbitrary decisions with respect to termination of a dealership. . . ." *McDaniel*, 480 F.Supp. at 676 (citations omitted). Moreover, the DDCA does not protect automobile dealers against "arbitrary" business decisions by an automobile manufacturer in respect of relocation or termination of a dealership. *Unionvale Sales Ltd. v. World-Wide Volkswagen Corp.*, 299 F.Supp. 1365 (D.C.N.Y.1969). And, absent coercion, automobile dealers are not protected under the DDCA against arbitrary refusals of automobile manufacturers to renew franchises. *See Berry Brothers Buick, Inc. v. General Motors Corp. (Buick Motor Division)*, 257 F.Supp. 542 (D.C.Pa. 1966), *aff'd*, 377 F.2d 552 (3rd Cir.1967). In the court's opinion, Hubbard has failed to allege conduct by defendant which amounts to coercion or intimidation. Therefore, plaintiff cannot maintain a claim under the DDCA

and summary judgment is proper in favor of defendant GM.

The Mississippi statute analogous to the DDCA, Miss. Code Ann. § 63-17-73 (1972), addresses essentially the same conduct as the DDCA [6] and defines good faith precisely the same as does the federal act.[7] Unlike the federal act, however, the Mississippi version goes on to define "coerce" as

> the failure to act in good faith in performing or complying with any terms or provisions of the franchise or agreement. However, recommendation, exposition, urging or argument shall not be deemed to constitute a lack of good faith.

Miss.Code Ann. § 63-17-55(17). Hubbard contends that the statute's definition of coercion as lask of good faith in effect reverts the term good faith to its customary common law meaning of imposing a duty of good faith and fair dealing. The court is not persuaded by this argument. The statute clearly defines good faith; coercion, in

---

[6] The statute makes it unlawful for an automobile manufacturer

> (2) To coerce, or attempt to coerce any motor vehicle dealer to enter into any agreement with such manufacturer . . . or to do any other act prejudicial to said dealer by threatening to cancel any franchise or any contractual agreement existing between such manufacturer . . . and said dealer.
>
> (3) To terminate or cancel the franchise or selling agreement of any such dealer without due cause. The non-renewal of a franchise or selling agreement, without due cause, shall constitute an unfair termination or cancellation, regardless of the terms or provisions of such franchise or selling agreement.
>
> (9) To prevent or attempt to prevent by contract or otherwise any motor vehicle dealer . . . from selling or transferring any part of the interest of any of them to any other person. . . . However, no dealer . . . shall have the right to sell, transfer or assign the franchise or any right thereunder without the consent of the manufacturer, distributor or wholesaler.

Miss.Code Ann. § 63-17-73(1)(d).

[7] *See* Miss.Code Ann. § 63-17-55(16) defining good faith).

turn, is simply defined with reference to good faith as that term is used in the Act itself. In the court's opinion, plaintiff's interpretation would render the stringent "good faith" standard of Miss. Code Ann. 63-17-55(17) meaningless and cannot be accepted. Since the definition of good faith is the same in both the state and federal laws, the analysis and conclusion would be the same under both. Accordingly, summary judgment is proper in favor of GM as to Hubbard's state DDCA claim.

Hubbard has sought damages against GM for tortious interference with its business relations. Specifically, plaintiff contends that GM has interfered with Hubbard's business relations with its customers in the Raymond, Mississippi area by refusing to permit Hubbard to relocate in Raymond so that it could adequately serve the Raymond area. Further, plaintiff asserts that GM has interfered with Hubbard's ability to sell its dealership assets by effectively and constructively terminating Hubbard's dealership without good faith. Plaintiff seeks damages for interference *not* with existing business relations or contracts, but with *prospective* relations with customers and purchasers.

A cause of action for tortious interference with business relations or contractual relations encompasses interference with a prospective relationship as well as an existing one. *Hayes v. Erwin*, 541 F.Supp. 397 (N.D.Ga. 1982), *aff'd*, 729 F.2d 1466 (11th Cir.), *cert. denied*, 469 U.S. 857, 105 S.Ct. 185, 83 L.Ed.2d 119 (1984). A claim for tortious interference with prospective contractual relations may be stated when an interferor prevents the making of a contract. To establish this claim, the plaintiff must establish that there was a reasonable probability that plaintiff would have entered into a contractual relationship, that defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming the plaintiff, that defendant was not privileged or justified, and that actual harm or damage

occurred as a result. *See C.E. Services Inc. v. Control Data Corp.*, 759 F.2d 1241 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 604, 88 L.Ed.2d 583 (1985). By definition, a "prospective" relationship does not require the present existence of the relationship. However, at the very least, it requires that at the time of the conduct complained of, there was a reasonable likelihood that the relationship would come into existence. This has been explained as follows:

> It is not necessary that it be absolutely certain that a prospective contract would have been entered into were it not for the interference. Reasonable assurance thereof in view of all the circumstances is sufficient. It is sufficient to show that the relationship between the plaintiff and another party had advanced to the point where the parties intended and were about to execute a contract or that negotiations were reasonably certain to result in a contract advantageous to the plaintiff.

45 Am.Jur.2d *Interference* § 40 (1969). Moreover, in order to establish the necessary "intent" on the part of the defendant, plaintiff must show that defendant had knowledge of the prospective contractual relationship he is accused of blocking. But it is not necessary that defendant have known the identity of the prospective purchaser, only that it knew that some party or parties had a prospective contractual or business relationship. *Verkin v. Melroy*, 699 F.2d 729 (5th Cir.1983).

In the case at bar, plaintiff's claims relative to GM's alleged interference in the eventual sale of the business are insufficient as a matter of law. McKee, president of Hubbard, admitted in deposition testimony that he has not had any offers for the purchase of the business. There has been no indication by Hubbard that a sale of the business was proposed or was in the offing. There having been no prospect of sale, GM can hardly be said to have known of the "prospective contractual relationship."

To survive a motion for summary judgment, the plaintiff must assert a specific and reasonable prospective contractual relationship that was interfered with. *See Joba Constr. Co., Inc. v. Burns & Roe, Inc.*, 121 Mich.App. 615, 329 N.W.2d 760 (1982). This, the plaintiff has failed to do.[8]

As regards plaintiff's claim of interference with its business relations with its customers in the Raymond area, that claim is likewise without merit. A prima facie case of tortious interference with business relations requires proof of the existence of a valid business relation or expectancy, knowledge by the alleged interferor of the relationship or expectancy, an intentional interference causing a termination or breach of the relationship or expectancy, and damage caused by the interference. *See* 45 Am.Jur.2d *Interference* § 50 (1969). In the case *sub* judice, there has been no showing that there was an "interference" by GM, intentional or otherwise. Although Raymond was removed from Hubbard's area of primary responsibility, that does not prevent Hubbard from selling automobiles to persons residing in the Raymond area as it has done since its establishment in 1927. Thus, plaintiff's claim must fail, and summary judgment should be granted in favor of GM on Hubbard's claim for tortious interference with contractual relations.

The court is of the opinion that as regards the rest of plaintiff's claims, disputed issues of material fact remain which prevent the granting of summary judgment as to those claims.

---

[8] This case is clearly distinguishable from *Frank Coulson, Inc. v. General Motors Corporation*, 488 F.2d 202 (5th Cir. 1974), wherein the court held that the jury could find GM liable for tortious interference with a dealer's contract negotiations with the proposed purchaser of Hubbard nor is there any evidence that plaintiff has attempted to sell the business. Plaintiff in fact admits, through its president, McKee, that there were no prospective purchasers of the business.

Accordingly, it is ordered that defendants motion for summary judgment is granted as to counts one, two and five of the complaint, and as to the remaining counts, the motion is denied.

APPENDIX C

Excerpts of Jury Instructions by the Court, Offered by Respondent of Peremptory Instruction

* * * *

[7] * * * The law implies that in every contract is a covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing imposes an obligation on the parties to a contract not to prevent, hinder or render imposible the other party's performance. Further, where a party to a contract makes the manner of its performance a matter of its own discretion, such discretion must be exercised honestly and in good faith. Good faith in the exercise of contractual discretion means that a party exercises such discretion for honest, legitimate business [8] purposes. Mere mistakes or errors of judgment do not constitute bad faith. Therefore, you may not find a breach of any covenant of good faith and fair dealing by Defendant based on mere mistakes or errors of judgment nor award damages to the Plaintiff for mere mistakes or errors of judgment. In this case, Hubbard claims that General Motors failed to exercise the discretion which it afforded itself under the dealer agreements honestly and in good faith by, one, refusing Hubbard's request to relocate to Raymond, Mississippi, while allowing other dealerships, including Hubbard's competitors to relocate. Two, by removing Raymond from Hubbard's area of primary responsibility thereby reducing Hubbard's planning potential. And three, by deciding that the dealership point would be terminated after Shelby Mackey died or left the dealership. General Motors claims, however, that it exercised its contractual discretion concerning these matters honestly and for legitimate purposes. If you find by a preponderance of the evidence that General Motors failed to make business decisions concerning Hubbard honestly and in good faith under the dealer agreements, then you shall find for Hubbard on its claim on the breach of the implied cove-

nant of good faith and fair dealing. If, however, you find that Defendant, General Motors, has exercised its contractual discretion honestly for legitimate business purposes, your verdict shall be for the [9] Defendant.

* * * *

[14] THE COURT: All right. The instructions that I have marked refused will be handed to the court reporter for insertion into the record. Does the defendant have any objections to the jury charges given or request any additional instructions?

MR. WISE: Defendant only requests D-1, Your Honor, for the grounds already stated in its motions for directed verdict, defending the issues of both liability and damages, that there is no jury issue.

THE COURT: All right, so that is the instructon marked refused. Will you get the jury, please?

* * * *

APPENDIX D

Excerpt from Respondent's Initial Motion for Directed Verdict

* * * *

[113] MR. WISE: May it please the Court pursuant to Rule 50 of the Federal Rules of Civil Procedure, the Defendant moves the Court for a directed verdict at the conclusion of Plaintiff's case on the following grounds: (1) There is no allegations of a breach of any expressed provision of the Dealer's Sales and Service Agreement between the Plaintiff and Defendant; (2) The Plaintiff has failed to offer evidence which, when due in the light most favorable to Plaintiff amounts to a breach of the implied covenant of good faith and fair dealings; (3) Under the Dealer's Sales and Service Agreement, which is Exhibit P-95, Article 6 "the parties agree that neither party owes the other any fiduciary [114] obligation" and Plaintiff has failed to show that this agreement of the parties shall be held void as a matter of public policy or law; (4) Plaintiff has failed to offer evidence which, in view of the light most favorable to the plaintiff, establishes either the existence of a fiduciary relationship or the breach of a fiduciary duty; and (5) Plaintiff has failed to show damages to a reasonable degree of certainty wherefore, Defendant, General Motors Corporation, prays that the Court enter a directed verdict in its favor and against the Plaintiff, Hubbard Chevrolet Company, and that a judgment be entered dismissing General Motor Corporation with prejudice and at the cost of Hubbard Chevrolet Company. That ends the Motion, Your Honor. Under Michigan law, Your Honor, and Michigan law is the law applicable in this case, and it's the law that the parties agreed with and stipulated would apply in the case, where the manner of performance is discretionary on a party, he must exercise good faith. That's *Carroll v. Vick Tanny Jones*, which put in a case involving a performance of a contract. This case is about

an agreement. An agreement that Mr. Mackey made and before him, his father, Mr. Doug Mackey, made that they would operate a dealership in Utica, Mississippi. Under the Dealer Sales and Service Agreement, part of the agreement, Exhibit P-94, is what's called a dealer location and premises addendum. And in that addendum, and in the [115] agreement itself. Mr. Mackey and his father before him agreed that they would operate a dealership in Utica, Mississippi. I refer the Court also to the additional provisions, Exhibit P-95, Article 2(b), that the dealer operator agrees to conduct his operations only from the location identified in the location and the premises addendum, that is Utica, Mississippi.

Now, whether or not Hubbard Chevrolet should be permitted to relocate to Raymond is a matter of agreement between the parties, and in order to affect such a change, both parties would have to agree that such a move would be proper, and in which case, it would necessitate a change to this addendum to the contract which is Exhibit P-94 which would say that the parties agree that from henceforth, Hubbard Chevrolet would operate from some location along Highway 18 in Raymond, Mississippi. That was never agreed upon. Now, matters of performance under the contract that are implicit in the federal case under Michigan law, are such things as the distribution of automobiles and parts where General Motors would have some discretion in that subject. The allocation of automobiles and parts, warranty reimbursement, processing of dealer orders for automobiles and parts and things of that nature, performance under the contract, Your Honor, and Mr. Mackey admitted in his testimony that performance of GM, as far as Utica was [116] concerned, is satisfactory. But his complaint is that they wouldn't agree to a new contract. That's his complaint. That's what this whole case is about, is that GM wouldn't agree to a new contract. * * *

* * * *

APPENDIX E

Respondent's Second Motion for Directed Verdict

* * * *

[128] BY MR. WISE: Your Honor, I would like on behalf of the Defendant, as I understand the Plaintiff has rested his Rebuttal, and all of the evidence is in, I would like to renew the motion for directed verdict at this time, which was made at the conclusion of the Plaintiff's case. The motion remains the same, Your Honor, as before, with this one slight amendment; and that is before the Plaintiff is entitled to the inferences in the light most favorable to the Plaintiff, he must provide or show substantial evidence. A scintilla of evidence is not enough. We submit that has not been shown in this case. That substantial evidence of either breach of a fiduciary duty or breach of a duty of good faith has not been shown. The Court has briefs on both of these points, as well as damages on all three issues. We believe there is not substantial evidence in the record to permit these issues to go to the jury. With regard to the issue of good faith, this case has come to the Court on the premise that there was some wrong-doing between Mr. Blackwell and Mr. Hydell with regard to what decisions were made with regard to Hubbard Chevrolet Company. The Court has now heard Mr. Hydell. Not a single question was asked him about any impropriety or any conversations with Mr. Blackwell on that [129] point. Mr. Blackwell is listed as a witness by the Plaintiff and wasn't called. The Plaintiffs have attempted to insinuate some misconduct with regard to the timing of the removal of Raymond from the APR, Hubbard Chevrolet, and the death of Mr. McKey. What we have seen now are two telegrams which clearly show that one office—the office recommending the removal of Raymond from the APR did not know of the death and was not notified by wire, until it was recevied the next morning. Mr. McKey testified they talked on the phone. We submit, Your Honor, that is not even a scin-

tilla of evidence, and certainly doesn't raise to the level of substantial evidence on that issue. There was a letter that was introduced that was addressed to Mr. W. C. McKey after his death, and that letter is supposedly an indication of bad faith on the part of General Motors Corporation; but, once we saw the letter, we see that it is simply a form letter and hardly raises to the level of substantial evidence on that issue. I submit that the differences in the tone of the conversations between Mr. McKey, at least the differences in the testimony regarding the tone of the conversations between Mr. McKey and various officials of Chevrolet, is not a ground for bad faith in this case. We have asked Mr. McKey about—he talks about bad faith and cover-up and so forth. It all boils down to one thing; and that is his complaint that he was not permitted to relocate to Raymond, Mississippi. The case [130] essentially boils down to a dispute over proper business decisions. He has failed to produce substantial evidence to this Court that the reasons, which he admits were given to him for not permitting the relocation, were not genuine reasons. In addition, Your Honor, Mr. McKey admitted on Cross-Examination with regard to the change in APR and so forth, that he is unable to quantify any damages in that regard. With regard to damages, in Mississippi, there is a bright line rule that, at least in Mississippi, that lost profits are not recoverable for a new enterprise. Clearly, this is a new enterprise that we are talking about here, new territory, new market, new building, and so forth. Under Michigan law, lost profits for a new business may be shown; but, recognizing the additional burden of trying to establish lost profits on a new business, under Michigan law, the evidence of the past history and earnings of related businesses in the area must be shown. The Plaintiffs have assiduously avoided, for obvious reasons, doing just that. They have stayed away from the one relevant business in the Raymond area, the Ford dealer, and have not presented evidence of other businesses in the area which

would show lost profits. Instead, they have come forward with a composite of dealers, none of which are in the State of Mississippi or Louisiana or the New Orleans zone. So, for all of these reasons, Your Honor, we submit that the motion for directed verdict should [131] be granted at this time.

* * * *

APPENDIX F

Excerpt from Respondent's Trial Brief

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J85-1178(L)

HUBBARD CHEVROLET COMPANY,
Plaintiff

vs.

GENERAL MOTORS CORPORATION,
Defendant

TRIAL BRIEF OF DEFENDANT GENERAL MOTORS CORPORATION ON PLAINTIFF'S CLAIM FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The Dealer Agreements between General Motors Corporation (GM) and Hubbard Chevrolet were unambiguous in providing GM the right to decline Hubbard's request for relocation to Raymond. Article II(B)(2) of the Additional Provisions section states:

> No change in Dealership Location or in use of Dealership Premises in Dealership Operations will be made without the written approval of General Motors.

Since the Dealer Agreements set forth the dealer's approved location, the written approval for a relocation would have to take the form of a new or amended contract executed by the parties.

The Dealer Agreements further provided GM the right to assign and change the dealer Area of Primary Responsibility, stating that the Chevrolet "Division will advise Dealer in writing of its Area of Primary Responsibility." Additional Provisions, Article II(C)(1). Similarly, the Dealer Agreements allow GM to assign Hubbard a planning potential figure in the Dealership Location and Premises Addenda which Hubbard chose to execute in 1980, 1984 and 1985. Thus, GM has acted pursuant to the Dealer Agreements between the parties in declining to enter a new contract with Plaintiff approving a new location and in revising Plaintiff's APR and planning potential. Indeed, since dealership location is an essential, material term of the Dealer Agreement, GM could not have agreed to a relocation without the provision of a new or amended contract. GM had no obligation to enter a new agreement. These remain the undisputed facts.

Plaintiff cannot use the covenant of good faith and fair dealing to imply obligations that would vary the express, unambiguous terms of the contract. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 485 (5th Cir. 1984); *Jackson Rapid Delivery Service, Inc. v. Jones Truck Lines, Inc.*, 641 F. Supp. 81, 85-86 (S.D. Miss. 1986); *Phillips v. Chevron U.S.A., Inc.*, 792 F.2d 521, 524-25 (5th Cir. 1984); *Jackson Rapid Delivery Service, Inc. v. Jones Truck Lines, Inc.*, 641 F. Supp. 81, 85-88 (S.D. Miss. 1986); *Phillips v. Chevron U.S.A., Inc.*, 792 F.2d 521, 524-25 (5th Cir. 1986); *Reinharcz v. Chrysler Motors Corporation*, 514 F. Supp. 1141, 1145 (C.D. Cal. 1981). Here the relevant three dealer agreements unambiguously provide GM the right to decline a dealer's request for relocation and to assign and revise Plaintiff's APR and planning potential. No covenant could be implied to restrict the clear rights that the unambiguous, express terms of the contracts provide to GM.

* * * *

APPENDIX G

Excerpt from Motion for Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J85-1178(L)

HUBBARD CHEVROLET COMPANY,
Plaintiff

vs.

GENERAL MOTORS CORPORATION,
Defendant

MOTION OF GENERAL MOTORS CORPORATION
FOR SUMMARY JUDGMENT

COMES NOW, the Defendant, General Motors Corporation ("GM"), and pursuant Rule 56 of the Federal Rules of Civil Procedure, moves the Court for summary judgment in its favor on the Complaint. In support of the Motion, GM would show the following:

* * * *

2.

The dealer sales and service agreements entered into by Hubbard Chevrolet and GM in 1980, 1984 and 1985 in identical terms specify Utica as the agreed upon location of operations of Hubbard Chevrolet.

* * * *

APPENDIX H

Excerpts from Respondent's Brief in Support of Motion for Summary Judgment

* * * *

The Court noted that "a cause of action exists in favor of the dealer only when the unfair and inequitable conduct of the manufacturer amounts to coercion or intimidation." 517 F.2d at 571. The Court found that Denver Buick, not GM, elected to terminate its franchise, and that prior to the sale GM had shown its willingness for Denver Buick to continue as a franchise dealer by offering a five-year renewal at the downtown location. 517 F.2d at 571. Similarly, in the present case GM has shown its willingness to have Hubbard Chevrolet continue as a dealer at Utica by renewing the Agreement on November 1, 1985 for five years, and pledging in the October 4, 1985 Kutina letter to remain with Hubbard so long as Hubbard wishes to remain at Utica.

In determining whether there was a Dealer's Act violation in the refusal to permit relocation, the Court first looked to whether General Motors had acted within the bounds of its the Dealer Agreement, stating:

> Weight must be attributed to the parties' own agreement. Denver Buick and General Motors had found 700 Broadway 'mutually satisfactory', and Denver Buick had covenanted not to move or establish a different location 'without the prior approval of Buick.' The trial judge correctly held that 'Neither franchise nor statute [gave] them [Denver Buick] a unilateral right to select a new location to their liking.' And this should be decisive absent such lack of good faith evidenced by acts of coercion or intimidation as would override the contractual undertaking. [517 F.2d at 572].

Similarly, weight must be attributed to the Dealer Sales and Service Agreements between Hubbard Chevrolet and GM. The Dealership Location and Premises Addendum in each of the 1980, 1984 and 1985 Agreements sets forth 105 White Oak Street, Utica, Mississippi as the mutually agreed upon location for Hubbard Chevrolet. Further, Hubbard covenanted that it would conduct dealership operation only from that location (Additional Provisions, Article II(B)(1)) and that no change in dealership location would be made without the written approval of GM (Article II(B)(2)). As in *Salco* this should be decisive of GM's good faith.

* * * *

VI.

GM DID NOT BREACH A COVENANT OF GOOD FAITH AND FAIR DEALING

The Plaintiff alleges at Count Four that, "Between 1980 and 1985 Defendant breached the covenant of good faith and fair dealing inherent in the franchise agreement in effect between the parties at that time by the actions set out above." GM refers the Court to the discussion of the issue of GM's good faith in Section III of this brief and to the discussion of GM's adherence to the agreements between the parties in Section II. The implied covenant of good faith under applicable Michigan law means simply that the party will not prevent, hinder or render impossible the other party's performance. *Lee & Desenberg*, 2 Mich. App. 365, 139 N. W.2d 916, 918 (1966). GM has not hindered Hubbard's performance of the Dealer Agreement. Hubbard does not allege that GM has prevented or hindered its performance of its contract in Utica, Mississippi. On the contrary, the gravamen of its complaint is that GM would not agree to its relocation to sites of its own choosing.

Under Mississippi law the result would be no different. The Agreement sets forth the scope of conduct accept-

able to the parties. As shown in Section II of this brief, above, GM has merely exercised its business judgment and conducted itself as the Dealer Agreement expressly permits. Not having breached any of the contract's provisions, as a matter of law GM has breached no covenant of good faith and fair dealing inherent in the contract.

* * * *

APPENDIX I

Excerpts from Principal Brief in Support of Motion for J.N.O.V.

* * * *

GM introduced at trial the Dealer Agreements of 1980, 1984 and 1985 which each provide GM's right to notify the dealer that it would not appoint a successor dealer. How could the contracts be any more clear? It states:

> If General Motors notifies Dealer that it does not plan to continue Dealership Operations at the Dealership Location, General Motors shall have no obligation to execute a new Successor Addendum. [Additional Provisions, Art. III(B)(6).

There is no room for a jury question here as to GM's good faith consistent with the contract.

* * * *

II. The Covenant Of Good Faith Has Been Misapplied In This Case As A Matter Of Law

A. The Verdict Represents The Unlawful Use Of An Implied Covenant Of Good Faith To Imply Obligations Inconsitsent With The Dealer Agreements

The Dealer Agreements of 1980, 1984 and 1985 between GM and Hubbard were unambiguous in specifying "105 White Oak Street" in Utica, Mississippi as the agreed upon located for Hubbard. Dealership Location and Premises Addendum. Further, the Dealer Agreements provided at Article II(B)(1):

> Dealer will conduct the Dealership Operations only from the location (herein called Dealership Location) approved for that purpose by General Motors and will not, either directly or indirectly, establish any place of business for the conduct of any of its Dealership Operations except at the Dealership Location.

The Dealership Planning Potential also referred to as "space guides," is set forth as well in Part II of the Dealership Location and Premises Addendum. Each of the Dealer Agreements provided that neither the Dealership Location nor the space guides reflecting planning potential could be changed except in writing:

> *Any changes in the Dealership Location* or Dealership Premises or their use in Dealership Operations agreed upon by Dealer and General Motors and *changes made by General Motors in space guides* shall be reflected in a new Dealer Location and Premises Addendum or a separate written agreement executed by Dealer and General Motors. [Additional provisions Art. II(B)(2). Emphasis added.]

The space guides of planning potential merely set a minimum level of space the dealer is required to provide for sales and service. The Dealer Agreements did not provide that the Area of Primary Responsibility set forth in the notice of Area of Primary Responsibility Addendum are exclusive territories of the dealer. Rather, the Dealer Agreements state on the first page that the right of the dealer to identify itself as a Chevrolet dealer at the approval location is "non-exclusive". The notice of Area of Primary Responsibility itself states only that the APR will be used as a geographic area "in making evaluations of effectiveness of Dealer's performance" and for "the development of the planning potential figures that will be furnished to Dealer in connection with the establishment of space guides for the dealership premises". Notice of Area of Primary Responsibility; Additional Provisions, Art. II(B)(3). APR and planning potential, then, are used by GM merely to rate dealer sales effectiveness; *they establish no limitations on dealer sales.* This is clear from the undisputed terms of the Agreements and from testimony of both Mr. McKey and our witnesses Norris, Waters, Haydel and Stiles.

The Dealer Agreements further provided GM the right to assign and change the dealer area of primary respon-

sibility, stating that the Chevrolet "Division will advise dealer in writing of its area of primary responsibility." Additional Provisions, Art. II(C)(1).

Thus, from the Dealer Agreements the following are clear and undisputed:

> (1) Hubbard Chevrolet agreed to operate at 105 Oak Street in Utica, Mississippi.
>
> (2) Hubbard could not change the location of its dealership without the written permission of GM through an amended or new contract.
>
> (3) GM had the right to assign and change the dealer APR and consequent planning potential calculated therefrom by written notice.
>
> (4) The APR is not an exclusive territory, but is employed by Chevrolet along with planning potential minimum space guides in evaluation of dealer effectiveness.

GM had an express contractural right to insist that Hubbard perform its agreement to remain at its approved location at 105 White Oak Street in Utica. Moreover, GM had the contractural right to assign changes in the Hubbard APR and planning potential by issuance of the Notice of Area of Primary Responsibility and of the Dealership Location and Premises Addendum. These are positive contract terms which GM had the absolute right to insist on. C.J.S., citing the Michigan case of *Antonoff v. Basso*, 78 N.W. 2d 604, 347 Mich. 18, states:

> The general rule is that where the parties to a contract are *sui juris*, the contract violates no rule of law or public policy, and no fraud or imposition has been practiced, *they are bound to perform it according to its terms*, particularly when it has been executed by the other party; and the failure to perform the obligation so undertaken . . . may constitute a breach of contract. This is so even though it may be

> difficult to determine the rights of the parties on a breach, *or even though the contract operates harshly or unjustly on one of the parties*, as appears infra 459, or entails a loss on him. [17A. C.J.S. *Contracts* § 451. Emphasis added].

Further:

> The general rule is that, where a person by his contract charges himself with an obligation possible and lawful to be performed, he must perform it. [17A C.J.S. *Contracts* § 459].

Hubbard was bound to perform its contracts by location in Utica and by holding primary responsibility for sales effectiveness within its asigned APR and by meeting minimum space guides established by planning potential. Hubbard could not rightfully insist on other, inconsistent terms.

The Fifth Circuit and U.S. District Courts bound by Fifth Circuit law have made it abundantly clear that the implied covenant of good faith and fair dealing cannot be used to abrogate the clear right of parties by contract. Thus, in *Bonanza International, Inc. v. Restaurant Management Consultants, Inc.*, 625 F. Supp. 1431 (E.D. La. 1986) the U.S. District Court, citing the Fifth Circuit, stated:

> It is well established in Louisiana, New York and other jurisdictions that, where the express intention of contracting parties is clear, a contrary intent will not be created by implication. *The implied covenant of good faith and fair dealing cannot give contracting parties rights which are inconsistent with those set out in the contract. Broad v. Rockwell International Corporation*, 642 F.2d 929, 957 (5th Cir. 1981). *See also Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 485 (5th Cir. 1984); *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 138 (5th Cir. 1979). [625 F. Supp. at 1448. Emphasis added].

* * * *

APPENDIX J

Excerpt from Reply Brief in Support of Motion for J.N.O.V.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J85-1178(L)

HUBBARD CHEVROLET COMPANY,
Plaintiff

vs.

GENERAL MOTORS CORPORATION,
Defendant

REPLY BRIEF OF GENERAL MOTORS CORPORATION IN SUPPORT OF ITS MOTION FOR JNOV OR, IN THE ALTERNATIVE, FOR NEW TRIAL OR REMITTITUR

I. Plaintiff Has Yet To Show That The Covenant Of Good Faith Could Be Applied To Imply Obligations On General Motors Inconsistent With The Dealer Agreements

The threshold legal question in this case is whether the covenant of good faith could be applied to require General Motors (GM) to consider entry into a new or modified contract with terms concerning location, APR and planning potential inconsistent with the terms of the existing, unambiguous Dealer Agreements. Further, since the Dealer Agreements do not address relocation except to include a no oral modification clause, and did not require GM to respond to a relocation request with negotia-

tions or otherwise, the legal question arises whether the relocation as well as APR issues involve the "manner of performance" of GM under the Dealer Agreements so as to invoke the covenant of good faith. (Initial BM Brief pp. 19-35).

The cases cited by Plaintiff are inapposite. GM's performance under the Dealer Agreements was not involved in the business decisions for which it was tried since Hubbard had no promise or rightful expectation that GM during the contract term would perform by considering changes to the Dealership Location and Premises Addendum or the Notice of Area of Primary Responsibility or the notice of planning potential. By contrast, the two car dealer cases cited by Hubbard both clearly involved the manufacturer's performance. In *Buono Sales, Inc. v. Chrysler Motors Corp.*, 363 F.2d 43 (3rd Cir. 1966) (cited in Plaintiff's Memorandum at p.4) performance was involved since the case concerned the manufacturer's obligation to continue manufacture during the term of the Dealer Agreements. The manufacturer had promised in the Agreements to use best efforts to fill orders for cars. The court noted that cessation of manufacturing would amount to a wrongful termination of the Dealer Agreements. Similarly, in *Junikki Imports, Inc. v. Toyota Motor Co.*, 335 F. Supp. 593 (N.D. Ill. 1971) (Plaintiff's Brief p.5) the manufacturer's performance was involved since the case involved the manufacturer's oral promise to supply dealers with parts and vehicles. But in this case GM made no promise and had no obligation to consider changes in location, APR and planning potential beyond the clear, unambiguous terms existing in the Dealer Agreements.

The leading case cited by Plaintiff (at p.6) of *Ferrell v. Vic Tanny International, Inc.*, 357 N.W. 2d 669, 673 (Mich. App. 1984) emphasizes the point since it states that the implied covenant of good faith applies, "[w]here a party to a contract makes *the manner of its performance* a matter of its own discretion". (Emphasis added).

Attorney General v. Michigan National Bank, 312 N.W. 2d 405 (Mich. App. 1981) (cited by Plaintiff at p.6) clearly involved the Defendant Bank's performance since it concerned the Bank's determination of amounts to be paid into mortgage escrow accounts under mortgage agreements. Again, the decisions at issue here do not involve GM's performance under the Dealer Agreements. The implied covenant is inapplicable.

The case cited by Plaintiff (at p.6) of *Lichnovsky v. Ziebart International Corp.*, 324 N.W. 2d 732 (Mich. 1982) is a case for wrongful termination of a license agreement without cause and thus involved the licensor's performance under the termination clause. This case involved neither a termination nor GM's performance of any clause under the Dealer Agreements. GM was not bound during the term of the Agreements to consider and negotiate changes to the express, unambiguous, settled terms of the Dealer Agreements.

GM in its initial brief cited the long line of cases in this circuit which hold that the implied covenant of good faith and fair dealing "should not be used to override or contradict" the express terms of a contract. Further, "[t]he mere exercise of one's contractual rights, without more, cannot constitute such a breach [of the implied covenant of good faith]." *See, Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 485 (5th Cir. 1984), *Broad v. Rockwell International Corp.*, 642 F.2d 929, 957 (5th Cir. 1981) and the cases cited by GM at pp.23-26 of its initial brief. In this circuit the courts have recognized that the covenant of good faith cannot be extended to abrogate the responsibility of a party such as Hubbard to adhere to the express terms of its Agreements. The five year Dealer Agreements stated Hubbard was to maintain its location at "105 White Oak Street" in Utica. The contracts stated that the Chevrolet "Division will advise dealer in writing of its area of primary responsibility," and went on to specify the APR and planning potential in the contract Addenda. (See GM

initial Brief pp.19-21). GM had no obligation in good faith to consider negotiation of inconsistent terms.

The Montana case cited by Plaintiff (p.7), *Dunfee v. Baskin-Robbins, Inc.*, 720 P.2d 1148 (Mont. 1986), is inapposite since there the covenant of good faith and fair dealing was invoked on the basis that the franchisor had acted to interfere with the franchisee's performance at its existing location. Baskin-Robbins, unlike GM with Hubbard, held the lease with the shopping center owner for the premises in which the franchisee operated. Baskin-Robbins actively interfered with the business of its franchisee at its existing location first by reducing the number of parking spaces and the number of entrances into the parking lot, resulting in a sharp decline in franchisee sales. Second, Baskin-Robbins, having necessitated the franchisee's relocation request by its interference with the franchisee's business at the existing location, interfered with the franchisee's business further by taking upon itself to misrepresent the terms of its lease of the existing premises. Baskin-Robbins stated that the franchisee could not move because Baskin-Robbins was committed to a 15 year lease when, in fact, the lease permitted a sublease at any time and termination after 5 years. There are no similar facts in this case to show that GM necessitated Hubbard's relocation request by interfering with Hubbard's performance under the Dealer Agreements at Utica or that GM sought to prevent Hubbard from moving by misrepresentations. There is no evidence that GM did anything to interfere with Hubbard's performance under the Agreements. Plaintiff conceded GM did not interfere with Hubbard's operations at Utica. Plaintiff's reliance on *Dunfee* is misplaced. Indeed, the undisputed evidence is that in April, 1985 when Mr. McKey unequivocably stated Utica would no longer be a viable location, the New Orleans Zone Manager, Mr. Mack Norris, agreed, and offered assistance to Hubbard to relocate to Eunice, Louisiana or any other larger, mutually acceptable Chevrolet point GM could help it find. Hubbard

declined the assistance, insisting on Raymond. Again, this is a case about a conflict in business judgments, not good faith.

Plaintiff has cited two cases as standing for the proposition that a franchisor cannot unreasonably refuse permission to a franchisee to assign, transfer or sublet a franchise. *Larese v. Creamland Dairies, Inc.*, 767 F.2d 716 (10th Cir. 1985); *Prestin v. Mobile Oil Corporation*, 741 F.2d 268 (9th Cir. 1984). However, like a landlord's rights against a tenant who sublets his premises, the franchisor does not lose its rights against the original franchisee when there is an assignment or sublease of the franchise agreement. The franchisee remains bound as a guarantor of the substitute franchisee's performance. In *Prestin*, for example, the Court quoted language from an earlier franchise assignment case stating that, "[w]e note that under the terms of the lease agreement, the lessor's consent to an assignment does not relieve lessee of any obligations under the lease." 741 F.2d at 271. It is, therefore, held in some jurisdictions that it is not unreasonable to promote the public policy favoring alienation of franchises and leases by requiring that the franchisor reasonably consider a substitute party. By contrast, "General Motors unquestionably has a vital stake in the locations of its Dealerships" that it would lose absolutely if it were forced to consider foresaking contractually approved dealer locations. *See, Salco Corp. v. General Motors*, 517 F.2d 567, 573 (10th Cir. 1975). GM can not abdicate to the dealers its responsibility for coordination of the locations of its nationwide dealer network. Only GM has the system-wide marketing perspective that places the customer's needs before the localized concerns of an individual dealer. It is because of such business considerations that the Fifth Circuit has been careful to limit the bounds of the implied covenant of good faith to prevent inconsistency with the express, unambiguous terms of contracts. Freedom to contract is a business necessity.

* * * *

APPENDIX K

Miss. Code Ann. § 63-17-73 (1972)

§ 63-17-73. Prohibited acts.

(1) It shall be unlawful and constitute a misdemeanor:

(a) For any person, firm, association, corporation or trust to engage in business as, or serve in the capacity of, or act as a motor vehicle dealer, motor vehicle salesman, or division, distributor branch or division, wholesaler branch or division, factory representative or distributor representative, as such, in this state without first obtaining a license therefor as provided in the Mississippi Motor Vehicle Commission Law, regardless of whether or not said person, firm, association, corporation or trust maintains or has a place or places of business in this state. Any person, firm, association, corporation or trust engaging, acting, or serving in more than one of said capacities or having more than one place where such business is carried on or conducted shall be required to obtain and hold a current license for each capacity and place of business.

(b) For a motor vehicle dealer or a motor vehicle salesman:

1. To require a purchaser of a new motor vehicle, as a condition of sale and delivery thereof, to also purchase special features, appliances, equipment, parts or accessories not desired or requested by the purchaser. However, this prohibition shall not apply as to special features, appliances, equipment, parts or accessories which are already installed on the car when received by the dealer.

2. To represent and sell as a new motor vehicle any motor vehicle which has been used and operated for demonstration purposes or which is otherwise a used motor vehicle.

3. To resort to or use any false or misleading advertisement in connection with his business as such motor vehicle dealer or motor vehicle salesman.

(c) For a manufacturer, a distributor, a wholesaler, a distributor branch or division, a factory branch or division, or a wholesaler branch or division, or officer, agent or other representative thereof, to coerce, or attempt to coerce, any motor vehicle dealer:

1. To order or accept delivery of any motor vehicle or vehicles, appliances, equipment, parts or accessories therefor, or any other commodity or commodities which shall not have been voluntarily ordered by said motor vehicle dealer.

2. To order or accept delivery of any motor vehicle with special features, appliances, accessories or equipment not included in the list price of said motor vehicles as publicly advertised by the manufacturer thereof.

3. To order for any person any parts, accessories, equipment, machinery, tools, appliances, or any commodity whatsoever.

4. To contribute or pay money or anything of value into any cooperative or other advertising program or fund.

(d) For a manufacturer, a distributor, a wholesaler, a distributor branch or division, a factory branch or division, or a wholesaler branch or division, or officer, agent or other representative thereof:

1. To refuse to deliver in reasonable quantities and within a reasonable time after receipt of dealer's order to any duly licensed motor vehicle dealer having a franchise or contractual arrangement for the retail sale of new motor vehicles sold or distributed by such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division or wholesale branch or division, any such motor vehicles as are covered by

such franchise or contract specifically publicly advertised by such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division or wholesale branch or division, to be available for immediate delivery. However, the failure to deliver any motor vehicle shall not be considered a violation of this subsection if such failure be due to acts of God, work stoppages or delays due to strikes or labor difficulties, freight embargoes or other causes over which the manufacturer, distributor, or wholesaler, or any agent thereof, shall have no control.

2. To coerce, or attempt to coerce any motor vehicle dealer to enter into any agreement, with such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesaler branch or division, or officer, agent or other representative thereof, or to do any other act prejudicial to said dealer by threatening to cancel any franchise or any contractual agreement existing between such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesaler branch or division, and said dealer. However, good faith notice to any motor vehicle dealer of said dealer's violation of any terms or provisions of such franchise or contractual agreement shall not constitute a violation of this subsection.

3. To terminate or cancel the franchise or selling agreement of any such dealer without due cause. The non-renewal of a franchise or selling agreement, without due cause, shall constitute an unfair termination or cancellation, regardless of the terms or provisions of such franchise or selling agreement. Such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesaler branch or division, or officer, agent or other representative thereof shall notify a motor vehicle dealer in writing, and forward a copy of such notice to the commission, of the termination or cancellation of the franchise or selling agreement of

such dealer at least sixty days before the effective date thereof, stating the specific grounds for such termination or cancellation. Such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesaler branch or division, or officer, agent or other representative thereof shall notify a motor vehicle dealer in writing, and forward a copy of such notice to the commission, at least sixty days before the contractual term of his franchise or selling agreement expires that the same will not be renewed, stating the specific grounds for such non-renewal, in those cases where there is no intention to renew the same. In no event shall the contractual term of any such franchise or selling agreement expire, without the written consent of the motor vehicle dealer involved, prior to the expiration of at least sixty days following such written notice. Any motor vehicle dealer who receives written notice that his franchise or selling agreement is being terminated or cancelled or who receives written notice that his franchise or selling agreement will not be renewed, may, within such sixty-day notice period, file with the commission a verified complaint for its determination as to whether such termination or cancellation or non-renewal is unfair within the purview of the Mississippi Motor Vehicle Commission Law, and any such franchise or selling agreement shall continue in effect until final determination of the issues raised in such complaint notwithstanding anything to the contrary contained in said law or in such franchise or selling agreement.

4. To resort to or use any false or misleading advertisement in connection with his or its business as such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesaler branch or division, or officer, agent or other representative thereof.

5. To offer to sell or to sell any new motor vehicle to any motor vehicle dealer at a lower actual price there-

for than the actual price charged to any other motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device, including but not limited to, sales promotion plans or programs which result in such lesser actual price. The provisions of this subsection shall not apply so long as a manufacturer, distributor or wholesaler, or any agent thereof, offers to sell or sells new motor vehicles to all motor vehicle dealers at the same price. This subsection shall not be construed to prevent the offering of volume discounts if such discounts are equally available to all franchised dealers in this state.

The provisions of this subsection shall not apply to sale to a motor vehicle dealer of any motor vehicle ultimately sold, donated or used by said dealer in a driver education program, or to sales to a motor vehicle dealer for resale to any unit of government, federal, state or local.

6. To offer to sell or to sell any new motor vehicle to any person, except a wholesaler or distributor, at a lower actual price therefor than the actual price offered and charged to a motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device which results in such lesser actual price.

7. To offer to sell or to sell parts and/or accessories to any new motor vehicle dealer for use in his own business for the purpose of repairing or replacing the same or a comparable part or accessory, at a lower actual price therefor than the actual price charged to any other new motor vehicle dealer for similar parts and/or accessories for use in his own business. However, it is recognized that certain motor vehicle dealers operate and serve as wholesalers of parts and accessories to retail outlets, and nothing herein contained shall be construed to prevent a manufacturer, distributor or wholesaler, or any agent thereof, from selling to a motor vehicle dealer who operates and serves as a wholesaler of parts and accessories,

such parts and accessories as may be ordered by such motor vehicle dealer for re-sale to retail outlets, at a lower actual price than the actual price charged a motor vehicle dealer who does not operate or serve as a wholesaler of parts and accessories.

8. To prevent or attempt to prevent by contract or otherwise any motor vehicle dealer from changing the capital structure of his dealership or the means by or through which he finances the operation of his dealership, provided the dealer at all times meets any capital standards agreed to between the dealership and the manufacturer, distributor or wholesaler, provided such standards are deemed reasonable by the commission.

9. To prevent or attempt to prevent by contract or otherwise any motor vehicle dealer or any officer, partner, or stockholder of any motor vehicle dealer from selling or transferring any part of the interest of any of them to any other person or persons or party or parties. However, no dealer, officer, partner or stockholder shall have the right to sell, transfer or assign the franchise or any right thereunder without the consent of the manufacturer, distributor or wholesaler.

(2) Concerning any sale of a motor vehicle or vehicles to the State of Mississippi, or to the several counties or municipalities thereof, or to any other political subdivision thereof, no manufacturer, distributor or wholesaler shall offer any discounts, refunds, or any other similar type inducements to any dealer without making the same offer or offers to all other of its dealers within the state. If such inducements above-mentioned are made, the manufacturer, distributor or wholesaler shall give simultaneous notice thereof to all of its dealers within the state.

APPENDIX L

Miss. Code Ann. § 63-17-55 (1972)

§ 63-17-55. Definitions.

The following words, terms and phrases, when used in the Mississippi Motor Vehicle Commission Law, shall have the meanings respectively ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) "Motor vehicle" means any motor-driven vehicle of the sort and kind required to have a Mississippi road or bridge privilege license and having four or more wheels.

(2) "Motor vehicle dealer" means any person, firm, partnership, co-partnership, association, corporation, trust, or legal entity, not excluded by subsection (3) of this section who holds a bona fide contract or franchise in effect with a manufacturer, distributor or wholesaler of new motor vehicles, and a license under the provisions of the Mississippi Motor Vehicle Commission Law, and such duly franchised and licensed motor vehicle dealers shall be the sole and only persons, firms, partnerships, co-partnerships, associations, corporations, trusts, or legal entities entitled to sell and publicly or otherwise solicit and advertise for sale new motor vehicles as such.

(3) The term "motor vehicle dealer" does not include:

(a) Receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under judgment, decree or order of any court; or

(b) Public officers while performing their duties as such officers; or

(c) Employees of persons, corporations or associations enumerated in subsection (3) (a) of this section when en-

gaged in the specific performance of their duties as such employees.

(4) "New motor vericle" means a motor vehicle which has not been previously sold to any person except a distributor or wholesaler or motor vehicle dealer for resale.

(5) "Ultimate purchaser" means, with respect to any new motor vehicle, the first person, other than a motor vehicle dealer purchasing in his capacity as such dealer, who in good faith purchases such new motor vehicle for purposes other than for resale.

(6) "Retail sale" or "sale at retail" means the act or attempted act of selling, bartering, exchanging, or otherwise disposing of a new motor vehicle to an ultimate purchaser for use as a consumer.

(7) "Motor vehicle salesman" means any person who is employed as a salesman by a motor vehicle dealer whose duties include the selling or offering for sale of new motor vehicles.

(8) "Commission" means the motor vehicle commission created by section 63-17-57.

(9) "Manufacturer" means any person, firm, association, corporation or trust, resident or non-resident, who manufacturers or assembles new motor vehicles.

(10) "Distributor" or "wholesaler" means any person, firm, association, corporation or trust, resident or non-resident, who in whole or in part sells or distributes new motor vehicles to motor vehicle dealers, or who maintains distrbutor representatives.

(11) "Factory bracnh" means a branch or division office maintained by a person, firm, association, corporation or trust who manufactures or assembles new motor vehicles for sale to distributors or wholesalers, to motor vehicle dealers, or for directing or supervising, in whole on in part, its representatives.

(12) "Distributor branch" means a branch or division office similarly maintained by a distributor or wholesaler for the same purposes a factory branch or division is maintained.

(13) "Factory representative" means a representative employed by a person, firm, association, corporation or trust who manufactures or assembles new motor vehicles, or by a factory branch, for the purpose of making or promoting the sale of his, its or their new motor vehicles, or for supervising or contracting his, its or their dealers or prospective dealers.

(14) "Distributor representative" means a representative similarly employed by a distributor, distributor branch, or wholesaler.

(15) "Person" means and includes, individually and collectively, individuals, firms, partnerships, co-partnerships, associations, corporations and trusts, or any other forms of business enterprise, or any legal entity.

(16) "Good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof, to act in a fair and equitable manner toward each other so as to guarantee the one part freedom from coercion, intimidation, or threats of coercion or intimidation from the other party. However, recommendation, endorsement, exposition, persuasion, urging, or argument shall not be deemed to constitute a lack of good faith.

(17) "Coerce" means the failure to act in good faith in performing or complying with any terms or provisions of the franchise or agreement. However, recommendation, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.